Office - Supreme Court, U.S.
FILED
SEP 20 1982
ALEXANDER L. STEVAS,
CLERK

82-468

No.

IN THE

Supreme Court of the United States

October Term, 1982

AMERICAN TRUCKING ASSOCIATIONS, INC., et al.,
Petitioners,

v.

THOMAS D. LARSON, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

ARTHUR R. LITTLETON*
THOMAS A. SCHNEIDER
2200 The Fidelity Building
123 South Broad Street
Philadelphia, Pennsylvania 19109
(215) 875-5301
Counsel for Petitioners

Of Counsel:
MORGAN, LEWIS & BOCKIUS

September 20, 1982

*Counsel of Record

International Printing Co., 711 So. 50th St., Phila., Pa. 19143 — Tel. (215) 727-8711

QUESTIONS PRESENTED

1. Whether the plurality's "balancing" test in *Kassel v. Consolidated Freightways Corp.*, 450 U. S. 662 (1981), or the dissent's "deference" standard should apply in a Commerce Clause challenge to the constitutionality of a state "highway safety" statute requiring the display of state inspection certificates by interstate trucks already subject to equally stringent federal inspection requirements (not reflected by the issuance of certificates) where (a) there was no legislative discussion at the time of enactment to demonstrate whether the state legislators really intended the statute as a measure to improve highway safety or were motivated by other factors, (b) there was no in-state constituency affected by the statute, and (c) the trial court found that the statute would actually worsen the risk of highway accidents involving trucks, a finding the court of appeals did not disturb.

2. Whether, under the guise of applying the dissent's deference test, the court of appeals in reality enunciated yet a third standard, one that creates an irrebuttable presumption in support of state legislation encroaching upon interstate commerce so long as the state devises any sort of *ex post facto* safety justification for the statute, regardless of how spurious the district court finds that justification to be.

PARTIES TO THE PROCEEDING AND DISCLOSURE OF CORPORATE AFFILIATIONS

Petitioners, American Trucking Associations, Inc., Pennsylvania Motor Truck Association, Maryland Motor Truck Association, Coastal Tank Lines, Inc., CRST, Inc., Smith Transfer Corp., Ryder Truck Lines, Inc. and Preston Trucking Corp. respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in this proceeding on July 20, 1982.* Respondents are Thomas D. Larson, Secretary of the Department of Transportation of the Commonwealth of Pennsylvania, Harvey Bartle, III, then Attorney General for the Commonwealth of Pennsylvania, and Daniel F. Dunn, Commissioner of the Pennsylvania State Police.

Pursuant to Rule 28.1 of the Rules of the Supreme Court, petitioners disclose the following information regarding corporate affiliations:

American Trucking Associations, Inc. ("ATA") is the national trade association of the motor carrier industry, comprised of fifty-one (51) federated associations located in the fifty states and the District of Columbia. It is a non-profit corporation, organized and operating under the laws of the District of Columbia. In addition, thirteen individual conferences representing specialized segments of the trucking industry are affiliated with ATA. ATA has one wholly-owned subsidiary, ATA Services, Inc., also non-stock.

---

* A more complete description of the petitioners appears in the accompanying Appendix for Petitioners American Trucking Associations, Inc., et al., and Steamship Operators Intermodal Committee, at page A46. Petitioner Steamship Operators Intermodal Committee will submit a separate petition.

The Pennsylvania Motor Truck Association, Inc. is the state-wide American Trucking Associations, Inc. affiliate trade association of the motor carrier industry in Pennsylvania. It is comprised of individual members representing all types of motor carriers, both private and for hire, and allied trades. It is a non-profit, non-stock corporation, organized and operated under the laws of the Commonwealth of Pennsylvania. The Pennsylvania Motor Truck Association, Inc. has no subsidiaries.

The Maryland Motor Truck Association is the state-wide American Trucking Associations, Inc. affiliate trade association of the motor carrier industry in Maryland. It is comprised of individual members representing all types of motor carriers, both private and for hire, and allied trades. It is a non-profit, non-stock corporation organized and operated under the laws of the State of Maryland. The Maryland Motor Truck Association has no subsidiaries.

Coastal Tank Lines, Inc. is a subsidiary of Coastal Industries, Inc. Other publicly-held subsidiaries of Coastal Industries, Inc. are BTS Leasing Inc., Leaseway Inc., Environmental Pollution Control Services, Inc., CTL Leasing Inc., Coastal Tank Lines, Inc. of Virginia, Ny-Trex Inc. and AIM Consultants Inc.

Smith's Transfer Corp. is a subsidiary of ARA Services, Inc.

Ryder Truck Lines, Inc. is a subsidiary of IU International, Inc.

Preston Trucking Corp. is a publicly-held corporation whose subsidiaries are all owned by Preston.

CRST, Inc. is a private company owned by a family-held corporation.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDING AND DISCLOSURE OF CORPORATE AFFILIATIONS	ii
TABLE OF AUTHORITIES	v
CITATION OF OPINION BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	1
STATEMENT	2
REASONS FOR GRANTING THE WRIT	11
I. The Court Should Take This Opportunity to Clarify Commerce Clause Analysis and Reaffirm the Role That Balancing Should Play in Cases Such as This	12
II. Even if Justice Rehnquist's Deference Test Is Applicable to Commerce Clause Challenges to State Highway Safety Legislation, Deference Does Not Mean Judicial Abdication	14
CONCLUSION	18

TABLE OF AUTHORITIES

Cases:	Page
Bibb v. Navajo Freight Lines, Inc., 359 U. S. 520 (1959)	14
Guiridge v. Commonwealth of Virginia, 532 F. Supp. 533 (E. D. Va. 1982)	12
Hunt v. Washington Apple Advertising Commission, 432 U. S. 333 (1977)	12
Kassel v. Consolidated Freightways Corp., 450 U. S. 662 (1981)	i, 2, 11, 13
National Tank Truck Carriers v. City of New York, 677 F. 2d 270 (2d Cir. 1982)	12
Raymond Motor Transportation, Inc. v. Rice, 434 U. S. 429 (1978)	2, 13
Sporhase v. Nebraska, 50 U. S. L. W. 5115 (U. S. July 2, 1982)	13

Constitutional Provisions:	
Article I, Section 8, Clause 3 (Commerce Clause)	*passim*
Fourteenth Amendment	5

Statutory Provisions:	
28 U. S. C. § 1254(1)	1
75 Pa. Cons. Stat. § 4703(a)(2)	*passim*
75 Pa. Cons. Stat. § 4723	16

Miscellaneous:	
Rules of the Supreme Court, Rule 28.1	ii
Pennsylvania Legislative Journal (House), Wednesday, June 11, 1980, at p. 1515	3

CITATION OF OPINION BELOW

The Opinion of the Court of Appeals for the Third Circuit, not yet reported, appears in the Appendix for Petitioners submitted hereto commencing at page A1. The United States District Court for the Middle District of Pennsylvania Opinion and Order are reported at 515 F. Supp. 1327 (M. D. Pa. 1981).

JURISDICTION

The Judgment of the Court of Appeals was entered on July 20, 1982. Appendix for Petitioners at pages A76-A77. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U. S. Constitution, Article I, Section 8, Clause 3:

> The Congress shall have Power . . . To regulate Commerce . . . among the several States.

75 Pa. Cons. Stat. § 4703(a)(2) (Purdon Cum. Supp. 1982-1983):

> § 4703. Operation of vehicle without official certificate of inspection
>
> (a) General rule. ——
>
> • • • •
>
> (2) No motor carrier vehicle shall be operated on a highway unless it displays a currently valid certificate of inspection issued under this chapter or by another state.

STATEMENT

This case demonstrates the substantial need to answer the questions left open by the Court's divided opinion in *Kassel v. Consolidated Freightways Corp.*, 450 U. S. 662 (1981), and offers an unrestricted opportunity for the Court to do so. It involves a Pennsylvania "highway safety" statute enacted with absolutely no legislative discussion to reveal the motivations of the legislators who voted for it. Thus, the case is devoid of the factors that prompted Justice Brennan's concurring opinion in *Kassel*, and squarely frames the question whether the plurality's "balancing" test or the dissent's "deference" standard should apply in Commerce Clause challenges to state highway safety statutes.

Review by the Court is important for a second reason as well. The court of appeals as the first appellate court to grapple with implementing Justice Rehnquist's approach in *Kassel* purported to apply the deference test. Actually, however, the court enunciated yet a third standard, one that renders the federal courts powerless to invalidate any state legislation passed and defended in the name of highway safety. So long as the state's attorneys are able at trial to come up with any *ex post facto* justification for the statute, the court of appeals has held, the trial court is obligated to accept that explanation as demonstrating the non-illusory contribution of the act to highway safety regardless of how spurious, unconvincing or unacceptable the trial court finds the state's explanation to be.

Under the test promulgated by the court of appeals, state highway safety legislation challenged under the Commerce Clause may be invalidated only if the state offers no defense, as in *Raymond Motor Transportation, Inc. v. Rice*, 434 U. S. 429 (1978). If the state comes forward with any evidence, however incredible, that is

the end of the court's inquiry. This standard, in effect, repeals the Commerce Clause in the highway safety context, and review by this Court is essential.

The Pennsylvania statute in question, Section 4703 (a)(2) of the Vehicle Code, 75 Pa. Cons. Stat. § 4703 (a)(2) [hereinafter "Section 4703(a)(2)" or "the Act"], would require all motor carrier vehicles (defined as trucks, truck tractors and tractor-trailer combinations over 17,000 lbs. gross weight) operating upon the highways of Pennsylvania to bear a currently valid state certificate of inspection.

While this requirement may at first blush appear innocuous, and probably seemed so to the legislators who inserted Section 4703(a)(2) into pending legislation at the last moment and enacted it with no discussion or debate,[1] the laws of thirty-one states [hereinafter referred

1. The legislation in which Section 4703(a)(2) was eventually inserted began as an amendment to the Pennsylvania Vehicle Code regulating the use of studded snow tires. After undergoing refinements as a studded snow tire bill, the legislation emerged from the Committee of Transportation of the House of Representatives with additional provisions increasing the annual fees for trucks and truck tractors and increasing maximum vehicle axle weights tacked on.

On third consideration before the House of Representatives, the statute was changed again—including a proposed amendment reducing from twice to once per year the number of inspections to which Pennsylvania registered vehicles would be subjected. Only after being referred to and emerging from a six-person joint Senate/House Conference Committee did the Act contain the inspection certificate requirement at issue here.

The legislation, with Section 4703(a)(2) belatedly inserted, was approved on June 18, 1980, to become effective in sixty days. During the debates about the legislation, only one remark was addressed specifically to Section 4703(a)(2), that of State Representative Ritter who remarked: "I just wanted to make sure we are not talking about inspecting out-of-state trucks." *Pennsylvania Legislative Journal (House)*, Wednesday, June 11, 1980, at p. 1515.

to as "non-inspection states"] do not require interstate motor carrier vehicles registered there to be periodically inspected at the state level or to display state inspection certificates. Of the other eighteen states (most of which are situated along the eastern seaboard) that require periodic inspections of and issue certificates to their interstate motor carrier vehicles, a few like Pennsylvania impose twice-yearly inspections, while most deem once per year to suffice [such states hereinafter being referred to as "inspection states"]. Pennsylvania, however, is the only state that seeks to intrude upon the sovereignty of its sister states by requiring vehicles registered there to bear state inspection certificates as a condition to entering into Pennsylvania regardless of the law of their home states.

All interstate motor carrier vehicles, from both inspection and non-inspection states, are subject to mandatory periodic inspections under federal Bureau of Motor Carrier Safety ("BMCS") regulations. Such motor carrier vehicles are inspected at intervals ranging from four to twelve times per year under safety criteria as stringent as Pennsylvania's to insure BMCS compliance. However, no state (or federal) certificates reflecting compliance with the federal inspection program are issued. In fact, at least six states which otherwise conduct mandatory periodic inspections upon their motor carrier vehicles exempt interstate motor carrier vehicles subject to BMCS regulation. Again, however, no state certificates are issued.

The Act was scheduled to take effect on August 17, 1980.[2] On August 18, a suit challenging the constitu-

2. On August 16, 1980, the Pennsylvania Department of Transportation published proposed regulations to implement Section 4703(a)(2) to the effect that:

tionality of the Act under both the Commerce Clause and Fourteenth Amendment was commenced. Joining in that effort were the American Trucking Associations, Inc., several other trucking associations and individual trucking companies [all of whom are hereinafter referred to collectively as "ATA"]. Later, the Steamship Operators Intermodal Committee ("SOIC") intervened to articulate the particular problems to the containerized steamship industry created by Section 4703(a)(2).

On August 19, 1980, after a hearing, the Honorable R. Dixon Herman of the United States District Court for the Middle District of Pennsylvania granted a temporary restraining order. At the conclusion of four days of testimony commencing on September 8, 1980, Judge Herman entered a preliminary injunction, enjoining the named defendants [hereinafter referred to collectively as "Pennsylvania"], and all persons in their control, from enforcing Section 4703(a)(2) or the proposed regulations. Significantly, it later appears, Pennsylvania requested a delay to prepare additional evidence for a permanent injunction hearing, and such a hearing commenced on November 3, 1980. Five more days of testimony began on that day.

2. (Cont'd.)

1. Both the tractor *and* trailer in any combination weighing more than 17,000 pounds would have to bear a certificate of inspection;

2. Any document recognized by the state of issuance as reflecting compliance with its inspection program would suffice under Section 4703(a)(2) as a currently valid certificate of inspection; and

3. Any motor carrier vehicle stopped inside Pennsylvania for violation of Section 4703(a)(2) would be granted a five day grace period to obtain the requisite certificate or other document if the driver provided "adequate proof" that it had been outside of the Commonwealth continuously for at least thirty days.

Upon the close of the evidence, final oral arguments were heard on February 26, 1981.

After consideration of the exhaustive record that was developed in this case, Judge Herman, in an Opinion and Order dated June 10, 1981, granted a permanent injunction restraining all enforcement of the Act and declaring it to be unconstitutional as an undue burden upon interstate commerce. Appendix for Petitioners [hereinafter referred to as "A"], pages A45-A73, A74-A75. Judge Herman found that approximately 1,000,000 interstate motor carrier vehicles are registered in non-inspection states. A51. Each of these 1,000,000 motor carrier vehicles would be forced by Section 4703(a)(2) somehow to obtain a certificate of inspection from one of the relatively few states that inspect such vehicles and issue certificates. Because of (1) the dearth of states west of Pennsylvania in which inspections of interstate motor carrier vehicles are available, (2) the paucity of inspection stations in Pennsylvania to handle the onslaught, their limited hours of night-time operation (when most truck traffic takes place) and locations distant from major interstate trucking routes, and (3) the costs, delays, diversions from route, disruptions of service and destruction to perishables and other cargoes that would result from interrupting transit to try to obtain inspection certificates either in Pennsylvania or elsewhere, Judge Herman concluded that the Act would impose a serious burden upon interstate commerce.[3] A72.

---

3. This is particularly so because of the nature of the motor carrier industry and Pennsylvania's requirement that both the tractor and trailer in tractor-trailer combinations bear separate inspection certificates. The demands of the industry, *i.e.*, the ability to pick up and deliver anywhere in the motor carrier's operating authority upon short notice, prevent carriers from being able to segregate their fleet geographically and limit only a portion to operating into and through Pennsylvania. Similarly, tractors

In light of the Act's substantial burden upon commerce, Judge Herman stated his personal belief that the balancing test would best safeguard the national interest in the free flow of goods and services in interstate commerce. To avoid creating unnecessary issues, however, Judge Herman applied the deference standard in determining Section 4703(a)(2)'s constitutionality. A69.

As to the putative safety contribution of the Act, Judge Herman found that Pennsylvania's evidence on this point was scant and unconvincing. Of all the statistical data submitted by Pennsylvania, the only items of evidence that purported to show a difference in the "safety" condition of federally-inspected interstate motor carrier vehicles from inspection versus non-inspection states were two surveys, found to be defect-ridden by the trial court, derived from roadside checks hurriedly conceived and carried out by Pennsylvania *during the brief interval* between the preliminary and permanent injunction hearings. For many reasons, including (a) the litigative context in which the surveys were conducted, (b) the haste and sloppiness with which the raw data was gathered and collated, (c) the failure of the surveys to record accurately (*or at all*) whether the stopped vehicle bore a state inspection decal or not (which was, after all, the key issue being tested), and (d) the inexperience of

3. (Cont'd.)

and trailers are seldom hitched together for more than one or two movements at a time. A tractor having delivered a trailer-load of goods in one location drops the trailer there, and picks up a new one to be hauled elsewhere. The constant interchanging of tractor and trailer equipment, together with the short notice and tight deadlines given to the carrier for shipments that have to be transported, means that even if a tractor bears an inspection sticker, when it picks up an uncertificated trailer during its travels, as well it might, entry of that combination into Pennsylvania would violate the Act.

the "inspectors" called upon to perform the roadside checks, Judge Herman rejected the surveys as meaningless. A51-A52 at n. 13.

Accordingly, even after adopting the legal standard most favorable to Pennsylvania, Judge Herman concluded that the safety contribution of the Act was illusory. A72. In fact, Judge Herman found that Section 4703(a)(2) actually *threatened to increase highway accidents* involving motor carrier vehicles in Pennsylvania by forcing large and heavy tractor-trailer combinations off the wide, straight and modern interstate highways where they typically spend the bulk of their time during interstate delivery runs, and onto narrow, hilly and winding back roads in search of Pennsylvania inspection stations. A72.

Pennsylvania appealed Judge Herman's decision to the United States Court of Appeals for the Third Circuit. In an opinion by the Honorable Dolores K. Sloviter, joined in by the Honorable Donald W. VanArtsdalen of the United States District Court for the Eastern District of Pennsylvania, sitting by designation, the court reversed Judge Herman's decision. The panel majority concluded that the deference standard should apply in Commerce Clause challenges to state highway safety legislation, and that Judge Herman, while supposedly doing so, had not correctly employed this test.

Though neither ATA nor SOIC in this case attacked the principle of safety inspections or their value in the abstract, in resolving the "safety" issue in this case, Judge Sloviter framed her two-fold inquiry as follows:

> One is whether there is a relationship between mechanical defects in motor carrier vehicles and accidents, and the second is whether there is a relationship between inspection and the timely discovery of such mechanical defects. A21.

Answering both questions in the affirmative, the panel majority then concluded that the Act would make a contribution to safety that is more than illusory. Thus, no amount of burden on commerce could overcome the Act's constitutionality.

In dissent, the Honorable Arlin M. Adams correctly perceived that the panel majority had asked and answered the wrong question in reversing Judge Herman's decision. In Judge Adams' view, the pertinent question was not whether annual or semiannual examinations of otherwise uninspected trucks and tractor-trailer combinations would contribute to highway safety, but whether the display of some state's inspection sticker makes a difference upon motor carrier vehicles that are already inspected regularly under federal BMCS standards. A40.

Unlike the panel majority, Judge Adams concluded that the prior decisions of this Court and the purposes designed to be served by the Commerce Clause argued in favor of the balancing test in cases such as this. Since to Judge Adams (1) the single most dominant feature of the record compiled before Judge Herman was the overwhelming burden on commerce that Section 4703(a)(2) would impose, and (2) interstate motor carrier vehicles are already inspected under comparable federal safety standards from between four to twelve times per year, the meager contribution of the Act to highway safety was clearly outweighed by its detrimental impact upon interstate commerce. A42-A43.

The panel majority buttressed its contrary conclusion by citing as support the discredited surveys that the trial judge had rejected as meaningless.[4] Although chiding the

4. "The Commonwealth introduced evidence that: . . . there is a relationship between low incidence of mechanical defects and periodic inspection." A20-A21.

• • • •

trial court for having discounted the surveys' results, the court of appeals did not demonstrate or hold that Judge Herman's refusal to embrace them because of their questionable credibility constituted clear error on his part. Rather, the panel majority simply concluded that (1) the surveys were part of the record, (2) regardless of the dubious circumstances in which the surveys were conceived and carried out, their results were an indication that motor carrier vehicles from inspection states had fewer mechanical defects than those from non-inspection states, and (3) this constituted a sufficient showing on Pennsylvania's part to meet its safety burden under the deference standard, notwithstanding all of the contrary evidence whose credibility Judge Herman clearly preferred.

Because this analysis, in the name of deference, actually propounds a standard of abdication, review by the Court is sought.

---

4. (Cont'd.)

"[I]n rejecting the evidence of some relationship between mechanical defects and accidents, the court gave no credence to the surveys introduced by the Commonwealth which showed a relationship between a low incidence of mechanical defects and periodic inspections." A26.

REASONS FOR GRANTING THE WRIT

Both the panel majority and dissent in the court of appeals recognized that this case squarely poses the question left open in *Kassel v. Consolidated Freightways Corp.*, 450 U. S. 662 (1981)—whether the balancing test or the deference standard is applicable in Commerce Clause challenges to state highway safety statutes. It does so, moreover, in circumstances in which the answer is outcome-determinative. The statute in question lacks the kind of questionable legislative history that led to Justice Brennan's concurring opinion in *Kassel*, and presents a clear opportunity for a majority of the Court to clarify its previously mixed signals for the guidance of all of the federal district courts, courts of appeals and state courts.

The court of appeals did not correctly interpret this Court's mixed signals in *Kassel*. That decision and other opinions by the Court support application of the balancing test. It is particularly warranted in those instances where a state statute, such as Section 4703(a)(2), will actually be detrimental to the safety purposes in whose name the statute was enacted. Finally, more detailed judicial scrutiny, of the sort the balancing test allows, is dictated where the state legislature has enacted a statute without carefully considering its implications and where there is no local, in-state constituency to exert political influence against enactment.

Even if deference is the proper legal test by which to evaluate state highway safety legislation under the Commerce Clause, the Court must correct the court of appeals and declare that deference does not mean erection of an irrebuttable presumption. Deference may mean that the courts stand aside if the legislature acted rationally; it cannot mean that the courts are powerless to intercede even

if they are not convinced, on the basis of the evidence presented, that the legislators' actions made a genuine contribution to safety.

I. The Court Should Take This Opportunity to Clarify Commerce Clause Analysis and Reaffirm the Role That Balancing Should Play in Cases Such as This.

ATA respectfully suggests that the reasoning by which the court of appeals decided to apply the deference standard is flawed and that this Court should take the opportunity to speak definitively on the issue. By doing so, the Court can put to rest an issue that has divided the circuits and will continue to perplex the district courts until resolved. *See National Tank Truck Carriers v. City of New York*, 677 F. 2d 270 (2d Cir. 1982) (balancing test adopted); *see also Gutridge v. Commonwealth of Virginia*, 532 F. Supp. 533 (E. D. Va. 1982) (balancing test).

The principal reason relied upon by the panel majority in this case for a highly deferential standard of judicial review was its conclusion that since Section 4703(a)(2) does not facially discriminate against out-of-state interests, there is adequate protection in the legislative process. A18. However, the checks and balances of the political process were not in effect during Pennsylvania's enactment of Section 4703(a)(2). Pennsylvania motor carriers were unaffected by Section 4703(a)(2). They were already subject to a periodic inspection program in their home state and therefore had established relationships with private, commercial inspection stations located near their depots to insure prompt inspection service when periodically required.

On the other hand, out-of-state carriers, like the Washington apple growers in *Hunt v. Washington Apple Advertising Commission*, 432 U. S. 333 (1977), were sud-

denly presented with a substantial barrier to carrying goods into and through Pennsylvania. Like the Washington apple growers, this barrier would affect their entire operation, not just a small portion, because there is no way to predict in advance or to isolate only a part of the carrier's fleet for use in Pennsylvania. The absence of any real impact upon in-state trucking companies means that the local interests relied upon by the panel majority to act as a counterweight against unduly burdensome state legislation really did not serve that function in this case.[5]

Accordingly, this Court should clarify the role that a judicial balancing of interests must play under the Commerce Clause where the state highway safety statute has not been subjected to the scrutiny of competing interests in the legislative process.

The panel majority also reads Justice Brennan's concurring opinion in *Kassel* as rejecting the balancing test. However, Justice Brennan recognized that heightened scrutiny is demanded where, as here, no definitive legislative discussion accompanied enactment of the statute. By the same token, Justice Marshall, who joined in Justice Brennan's concurring opinion in *Kassel*, voted with Justice Powell in *Raymond* to apply the balancing test. Moreover, in *Sporhase v. Nebraska*, 50 U. S. L. W. 5115 (U. S. July 2, 1982), seven Justices of this Court, including Justices Brennan and Marshall, applied the balancing test to a state health and safety statute. Traditionally, decisions of the Court have recognized that the state interest in protecting its citizenry in the health and safety field is just as compelling as it is in the realm of highway safety.

5. The only Pennsylvania-based motor carrier to appear at trial testified for Pennsylvania in favor of Section 4703(a)(2). Of course, its enactment did not affect his operations in the slightest, while substantially raising the costs of out-of-state motor carriers wishing to share the highways of Pennsylvania with him.

Review by the Court to consider whether balancing should apply in cases such as this is appropriate for a third reason as well. State statutes passed in the name of highway safety may fail to further that goal for a variety of reasons. A distinction should be drawn, however, between statutes which merely fail to meet the stated safety purpose without more, and those which not only fail to augment the state's safety interest but actually threaten to increase highway accidents by their own impact.

In the latter category falls Section 4703(a)(2). By forcing large and heavy tractor-trailer combinations off the wide, straight and modern interstate highways and onto narrow, hilly and winding back roads in search of inspection stations, Judge Herman found (and the court of appeals did not disturb his finding) that Section 4703(a)(2) actually threatened to increase accidents involving motor carrier vehicles in Pennsylvania. When a state legislature, without focusing upon or discussing the implications of its actions and without the advocacy of opposing constituencies, enacts a statute which promises not only to do little good but actually would bring about substantial harm, this should be a factor in deciding how much deference should be accorded the statute under Commerce Clause analysis. The fact that the statute in question is completely out of line with the laws of other states and intrudes upon their sovereignty is an additional factor militating in favor of a balancing approach. *Bibb v. Navajo Freight Lines, Inc.*, 359 U. S. 520 (1959).

II. Even if Justice Rehnquist's Deference Test Is Applicable to Commerce Clause Challenges to State Highway Safety Legislation, Deference Does Not Mean Judicial Abdication.

If the court of appeals correctly discerned from the Court's mixed signals that deference is the proper test to

apply, review is still appropriate if only to clarify how that test should be implemented. The panel majority, to find a basis upon which to reverse Judge Herman, coupled evidence in the record that did not speak to the Act's contribution to safety with other evidence that purported to address the issue, but which Judge Herman rejected as meaningless.

The result is an opinion which blurs a crucial distinction—the Pennsylvania legislature may very well have been rational in its wish to try to reduce highway accidents involving trucks; however, if the way it went about trying to do so was not shown by any competent evidence to make a meaningful contribution to that end, the legislators' good intentions alone cannot insulate the Act from further Commerce Clause inquiry. Stated differently, if state legislators think they are serving the interest of highway safety, does that fact alone bind the trial court to uphold the constitutionality of the resulting statute notwithstanding (1) its tremendous impact on interstate commerce, (2) its threat actually to worsen the danger of accidents on the road, and (3) the total absence of credible evidence that it will actually contribute to highway safety?

Aside from the two discredited surveys, the statistical evidence adduced by the panel majority in support of the Act's constitutionality only demonstrates (a) that trucks are involved in a regretably high number of accidents, (b) that a portion of these accidents involve vehicle defects, and (c) that many motor carrier vehicles stopped on roadside checks by BMCS inspectors are found to have defects. A19-A20, A25.

This evidence concededly demonstrates that a problem exists about which the Pennsylvania legislature could rationally be concerned. The evidence does *not*, however, support the conclusion the panel majority then reaches—that enactment of Section 4703(a)(2) was a meaningful

response to such problem. First of all, the motor carrier vehicles represented in the accident and roadside check surveys cited by the panel majority were registered in both inspection states and non-inspection states.[6] However, each vehicle's state of origin was not captured in the surveys' results, and hence the surveys did not attempt to (nor could they) demonstrate a difference in the accident or defect experience of federally-inspected motor carrier vehicles from inspection states against those from non-inspection states.

The only other basis offered by the panel majority for its reversal of Judge Herman was its rather self-evident observation that inspections will detect some existing vehicle deterioration before it reaches the final state of failure. Implicit though unstated in this observation is the notion that if interstate motor carrier vehicles are now being inspected 4 to 12 times per year under the BMCS program, Section 4703(a)(2) will contribute to safety by requiring one or two *additional* inspections, which cannot but improve their safety record.

This assumption is wrong for two reasons. It ignores the authorization given to fleet inspections under Pennsylvania law and the laws of other states. *See, e.g.*, 75 Pa. Cons. Stat. § 4723. A motor carrier who enjoys fleet inspection privileges performs his own periodic state inspections and affixes the certificates himself. The state-sanctioned periodic inspections are performed by the *same*

6. Curiously, the court of appeals ignored the only data that compared the *accident* record of federally-inspected interstate motor carrier vehicles from non-inspection states against that of vehicles from inspection states. This evidence, a statistical survey by Pennsylvania's Department of Transportation of accidents involving heavy trucks in 1978, showed that it was tractors from *inspection states* that were involved in a disproportionately higher number of defect-related highway accidents.

employees who regularly inspect for BMCS compliance. As to these carriers, the advent of Section 4703(a)(2) will simply mean that during one or two of the 4 to 12 BMCS inspections per year the employee will additionally affix some state sticker to the motor carrier vehicle.

Secondly, under the BMCS federal safety standards, the carrier is obliged to inspect his vehicles regularly and systematically. There is no requirement as to who performs the inspections, just that they be done. Thus, a carrier is free to have one or more of his BMCS inspections performed at a private, commercial inspection station, from which a state certificate can also be obtained when required. While it may be costly, time-consuming and burdensome to the carrier to shift the locus of some of the inspections from his maintenance shop to an outside station, the point is that nothing in Section 4703(a)(2) will necessarily increase the total number of inspections to which even non-fleet inspected vehicles will be subjected.

In summary, the Pennsylvania legislature may have been hoping to improve highway safety by enacting Section 4703(a)(2), but no credible evidence of trial, statistical or otherwise, suggests that the Act accomplished that goal. Its impact on safety will actually be adverse. Under the deference test, a showing of a meaningful contribution to safety may insulate a statute from challenge despite its burden on commerce. The court of appeals, however, has created a new doctrine that irrebuttably presumes that burdensome state legislation satisfies Commerce Clause scrutiny so long as the state submits *any* evidence of the legislators' earnest desire to promote safety. This result applies even if, as here, the trial court simply did not believe the state's evidence that the statute would produce any such beneficial results.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

ARTHUR R. LITTLETON
THOMAS A. SCHNEIDER
2200 The Fidelity Building
123 South Broad Street
Philadelphia, PA 19109
(215) 875-5301
Counsel for Petitioners

Of Counsel:
MORGAN, LEWIS & BOCKIUS

September 20, 1982.

82-468

No.

Office - Supreme Court, U.S.
FILED
SEP 20 1982
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

October Term, 1982

AMERICAN TRUCKING ASSOCIATIONS, INC., et al.,
Petitioners,

v.

THOMAS D. LARSON, et al.,
Respondents.

APPENDIX FOR PETITIONERS, AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL., AND STEAMSHIP OPERATORS INTERMODAL COMMITTEE, TO PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Seymour H. Klegler*
Mel P. Barkan
Patricia A. Fosdick
120 Broadway
New York, New York 10271
(212) 732-5535
Counsel for Petitioner Steamship Operators Intermodal Committee

Of Counsel:
Brauner Baron Rosenzweig Klegler Sparber & Bauman

Arthur R. Littleton*
Thomas A. Schneider
2200 The Fidelity Building
123 South Broad Street
Philadelphia, Pennsylvania 19109
(215) 875-5301
Counsel for Petitioners American Trucking Associations, Inc., Pennsylvania Motor Truck Association, Maryland Motor Truck Association, Coastal Lines, Inc., CRST, Inc., Smith Transfer Corp., Ryder Truck Lines, Inc. and Preston Trucking Corp.

Of Counsel:
Morgan, Lewis & Bockius

*Counsel of Record

September 20, 1982

International Printing Co., 711 So. 50th St., Phila., Pa. 19143 — Tel. (215) 727-8711

TABLE OF CONTENTS OF APPENDIX

	Page
Opinion of the United States Court of Appeals for the Third Circuit Dated July 20, 1982	A1
Opinion and Order of the United States District Court for the Middle District of Pennsylvania Dated June 10, 1981	A45
Judgment of the United States Court of Appeals for the Third Circuit Dated July 20, 1982	A76
Order of the United States Court of Appeals for the Third Circuit Denying Petitions for Rehearing Dated August 13, 1982	A78
Order of the United States Court of Appeals for the Third Circuit Staying Issuance of Certified Judgment in Lieu of Formal Mandate Dated August 20, 1982	A80
Statute Involved—75 Pa. Cons. Stat. Ann. § 4703(a)(2) (Purdon Cum. Supp. 1982-1983)	A81

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 81-2312

AMERICAN TRUCKING ASSOCIATIONS, INC., PENNSYLVANIA MOTOR TRUCK ASSOCIATION, MARYLAND MOTOR TRUCK ASSOCIATION, COASTAL LINES, INC., CRST, INC., SMITH TRANSFER CORP., RYDER TRUCK LINES, INC., PRESTON TRUCKING CORP., and INTERVENOR STEAMSHIP OPERATORS INTERMODAL COMMITTEE,

Appellees

v.

THOMAS D. LARSON, Secretary of the Department of Transportation of the Commonwealth of Pennsylvania; HARVEY BARTLE, III, Attorney General of the Commonwealth of Pennsylvania; DANIEL F. DUNN, Commissioner of the Pennsylvania State Police,

Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA
(D.C. Civil No. 80-0899)

Argued: February 16, 1982
Before: ADAMS and SLOVITER, *Circuit Judges*
and VAN ARTSDALEN, *District Judge* *
(Opinion filed July 20, 1982)

---

* Honorable Donald W. Van Artsdalen, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

Michael R. Deckman (Argued)
Deputy Chief Counsel
Pennsylvania Department of
Transportation
Office of the Chief Counsel
Harrisburg, PA 17120
Attorney for Appellants

Of Counsel:
Morgan, Lewis & Bockius

Arthur R. Littleton (Argued)
Thomas A. Schneider
2200 The Fidelity Building
Philadelphia, PA 19109
Attorneys for Appellees,
American Trucking Associations, Inc.,
Pennsylvania Motor Truck Association,
Maryland Motor Truck Association,
Coastal Lines, Inc.,
CRST, Inc., Smith Transfer Corp.
Ryder Truck Lines, Inc., and
Preston Trucking Corp.

Of Counsel:
Brauner, Baron, Rosenzweig,
Kligler, Sparber & Bauman

Seymour H. Kligler (Argued)
Mel P. Barkan
120 Broadway
New York, New York 10271
Attorneys for Appellee
Intervenor Steamship Operators
Intermodal Committee

Edward A. Woolley
Lawless and Woolley
720 Fifth Avenue
New York, New York 10019
Attorneys for Amicus Curiae
Institute of International
Container Lessors, Ltd.

OPINION OF THE COURT

SLOVITER, *Circuit Judge.*

I.

A Pennsylvania statute, enacted in 1980 as an amendment to its Motor Vehicle Code, requires that all "motor carrier vehicles", *i.e.*, truck, truck tractors, and combinations, whether or not registered in Pennsylvania, must be periodically inspected either under the law of Pennsylvania or some other state. The district court held that this provision imposes an unconstitutional burden on interstate commerce and issued a declaratory judgment and a permanent injunction against its enforcement. *American Trucking Associations, Inc. v. Larson*, 515 F. Supp. 1327 (M.D. Pa. 1981). Pennsylvania, acting through its relevant public officials (hereafter referred to collectively as "Pennsylvania"), appeals. We reverse the judgment of the district court.

II.

The statute at issue provides that "[n]o motor carrier vehicle shall be operated on a highway unless it displays a currently valid certificate of inspection issued under

this chapter or by another state."[1] 75 Pa. Cons. Stat. Ann. § 4703(a)(2) (Purdon). Section 102 of the Code defines "motor carrier vehicle" as "[a] truck, truck tractor or combination having a gross weight or registered gross weight in excess of 17,000 pounds." 75 Pa. Cons. Stat. Ann. § 102. A "combination" is defined as "[t]wo or more vehicles physically interconnected in tandem." *Id.*

On August 16, 1980 the Pennsylvania Department of Transportation published proposed regulations enforcing section 4703(a)(2). They provide in part:

> § 494.2. Combinations.
>
> Both the towing vehicle and the trailer in a combination having a gross weight or registered gross weight in excess of 17,000 lbs. shall comply with the provisions of section 4703(a)(2) and (c) of the Vehicle Code and this chapter.
>
> § 494.3. Display of valid certificate of inspection from another state.
>
> Vehicles, including elements of a combination, will be regarded as displaying a currently valid certificate of inspection issued by another state, if:
>
> (1) the vehicle was required to be inspected as a prerequisite to registration and bears a currently valid registration plate; or
>
> (2) the driver exhibits on requests of any police officer or a Department employee engaged in weighing vehicles a currently valid document issued in accordance with the law or regulation of another state evidencing that the vehicle has been inspected.

---

1. Section 4703(h) provides that any person violating § 4703 "is guilty of a summary offense and shall, upon conviction, be sentenced to pay a fine of up to $25."

§ 494.4. Vehicles re-entering this Commonwealth.

Vehicles, including elements of a combination, which have been outside this Commonwealth continuously for 30 days or more and which, at the time of re-entering this Commonwealth do not bear a currently valid certificate of inspection shall be inspected within five days of re-entering this Commonwealth. The driver of the vehicle shall be required at the request of a police officer or Department employe engaged in weighing vehicles . . . to provide adequate proof that the vehicle has been outside this Commonwealth continuously for at least 30 days.

10 Pa. Bulletin 3397-98 (to be codified at 67 Pa. Code Ch. 494).

Plaintiffs are American Trucking Associations, Inc. (ATA), a federation composed of state trucking associations; two state trucking associations acting separately; and five trucking companies. Plaintiffs filed suit in the United States District Court for the Middle District of Pennsylvania challenging section 4703(a)(2) and the accompanying regulations as violative of the Commerce Clause and the Due Process and Equal Protection Clauses of the Fourteenth Amendment. Subsequently, Steamship Operators Intermodal Committee (SOIC), an unincorporated association whose members are common carriers by water and are engaged in the intermodal transportation of containerized cargo in the interstate and foreign commerce of the United States, was permitted to intervene as a plaintiff.

After hearings, the district court first entered a temporary restraining order and then granted a preliminary injunction against the enforcement of the statutory section in question. After further hearings on the merits,

the court rendered the decision which is the subject of this appeal.

The district court held that the purported purpose of this inspection provision is to improve highway safety in Pennsylvania, that the "evidence . . . suggests that no correlation exists between mandatory periodical inspections and highway safety," 515 F. Supp. at 1331, that the Pennsylvania law places substantial burdens on interstate commerce, and that the periodic inspection statute "has, at best, insubstantial, slight, and problematical benefits." *Id.* at 1338. The court concluded "that the strong presumption of validity accorded to this legislation has been overcome and that the statute violates the Commerce Clause." *Id.* at 1340.

III.

Before reviewing the district court's findings and conclusions in light of the evidence presented, it will be useful to consider at the outset the legal standard which federal courts should apply in reviewing state regulation under a Commerce Clause attack. Such an inquiry is seriously handicapped by the failure of the Supreme Court to clarify the standard to be applied. The members of the Court have been sharply divided on this issue. This leaves the inferior federal courts to attempt to fashion a workable analysis from the various, and sometimes inconsistent, opinions of the members of the Court.

The Commerce Clause, contained in Article I, § 8 of the Constitution, is phrased as an affirmative grant of power to Congress: "The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes. . . ." Once Congress acts pursuant to this plenary power, its pre-emptive effect is established. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824). It is only when Congress has

not acted that the issue of state power arises. Although the Commerce Clause does not explicitly limit state interference with interstate commerce, it is well settled that even in the absence of a congressional exercise of this power, the Commerce Clause "prevents the States from erecting barriers to the free flow of interstate commerce." *Raymond Motor Transportation, Inc. v. Rice*, 434 U.S. 429, 440 (1978). As Professor Tribe has stated, "All of the doctrine in this area is thus traceable to the Constitution's *negative implications;* it is by interpreting 'these great silences of the Constitution' that the Supreme Court has limited the scope of what the states might do." L. Tribe, *American Constitutional Law* 320 (1978) (footnote omitted).

Fortuitously, there has appeared at this time a scholarly and provocative analysis of the dormant commerce clause. Eule, *Laying the Dormant Commerce Clause to Rest*, 91 Yale L.J. 425 (1982). It is Professor Eule's thesis that the Commerce Clause was designed to provide Congress with "a tool for encouraging [the] free trade ideal as a means of protecting the nation from self-destruction," *id.* at 435; that such a role is a value-laden one appropriate for Congress but not for the courts which, in the commerce area at least, should focus on discriminatory or disproportionate state legislative treatment of interstate commerce, and that such analysis would be "more comfortably embedded in the privileges and immunities clause of Article IV." *Id.* at 428. Under the present state of the law, the decision in *Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 181 (1869), limits application of the privileges and immunities clause to natural persons. As an inferior federal court we are not free to exercise the same license as scholars in disregarding still binding precedent. Accordingly, even if we were persuaded that it is in fact time to rethink the application of the Com-

merce Clause in cases such as the one before us, we are bound to restrict our analysis within the confines of that clause.

State legislation covering the gamut of commercial activity has been challenged as violative of the Commerce Clause but the Court has frequently emphasized that it is most reluctant to employ the Commerce Clause to invalidate state regulation in the field of safety. "In no field has this deference to state regulation been greater than that of highway safety regulation." *Raymond Motor Transportation, Inc. v. Rice*, 434 U.S. at 443. *See, e.g., Brotherhood of Locomotive Firemen & Enginemen v. Chicago Rock Island & Pacific Railroad*, 393 U.S. 129 (1968) (upholding Arkansas laws requiring trains traveling further than specified distances within the state to be operated by crews of at least a designated minimum number); *South Carolina State Highway Department v. Barnwell Brothers, Inc.*, 303 U.S. 177 (1938) (upholding state regulation which barred from state highways all trucks wider than 90 inches or heavier than 10 tons where 85-90% of trucks used in interstate commerce exceeded these limits); *Bradley v. Public Utilities Commission*, 289 U.S. 92 (1933) (upholding state's refusal to license interstate carrier over route because of traffic congestion).

It is when the Court, in the name of the Commerce Clause, has invalidated state regulation that a consistent rationale has been more difficult to find. In only three cases in the last 30 terms has the Court invalidated state regulation purportedly enacted in the name of highway safety.[2] It is in these three cases that we must search for an analytic approach.

---

2. *See* compilation in Eule, *Laying the Dormant Commerce Clause to Rest*, 91 Yale L.J. 425, 437 nn.60 & 61 (1982).

In *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520 (1959), the Court held unconstitutional an Illinois statute requiring contour mudguards on trucks and trailers operated within the state. In nearly every other state "straight flap" mudguards were lawful and, in one state, contour mudguards were prohibited. Not only had the district court stated that it was "conclusively shown that the contour mud flap possesses no advantages over the conventional or straight mud flap," but that court had also stated that "there is rather convincing testimony that use of the contour flap creates hazards previously unknown to those using the highways." *Id.* at 525. It was conceded that the statute in question severely burdened interstate commerce, a burden the Court characterized as "rather massive." *Id.* at 528. Although the fact that the Illinois regulation conflicted with that in Arkansas and that vehicles equipped to meet the standards of the Arkansas statute would not comply with the Illinois standards might have supported a finding that the Illinois statute discriminated against some interstate carriers, the Court did not choose to rest its holding on that basis. Instead, it measured the burden on interstate commerce imposed by the Illinois statute against the alleged safety benefits, and found that the showing of safety benefit was "far too inconclusive" when balanced against the heavy burden which the Illinois mudguard law placed on the interstate movement of trucks and trailers. *Id.* at 530.

Two significant factors emerge from that decision. First, the Court recognized that the mere fact that a regulation imposed a burden on interstate commerce would not itself justify invalidating that state regulation. The Court stated, "If we had here only a question whether the cost of adjusting an interstate operation to these new local safety regulations prescribed by Illinois unduly

burdened interstate commerce, we would have to sustain the law under the authority of the *Sproles* [*Sproles v. Binford*, 286 U.S. 374 (1932) (local regulation of truck size and weight)], *Barnwell* [*South Carolina State Highway Department v. Barnwell Brothers, Inc., supra* (state control of width and weight of motor trucks and trailers)] and *Maurer* [*Maurer v. Hamilton*, 309 U.S. 598 (1940) (motor carriers prohibited from carrying other vehicles above the cab of the carrier)] cases." *Id.* at 526. According to the Court, the *Bibb* case presented a different issue because in the earlier cited cases, the Court was not faced with standards prescribed by one state which conflicted with those prescribed by another. *Id.* Second, the Court observed, "This is one of those cases—few in number—where local safety measures that are nondiscriminatory place an unconstitutional burden on interstate commerce". *Id.* at 529. Implicit in this observation is the fact that, ordinarily, it is those measures that are discriminatory which are the focus of the Commerce Clause.

In two more recent opinions the Court again was presented with state regulations promulgated in the name of highway safety. In *Raymond Motor Transportation, Inc. v. Rice*, 434 U.S. 429 (1978), the Court considered a Wisconsin statutory scheme which prohibited trucks longer than 55 feet from the state highways without a permit. As a result, most "doubles", tractors pulling two trailers, were prohibited from operating on Wisconsin highways, although 65-foot doubles were permitted in the adjacent states and in all of the states west from Minnesota to Washington through which principal interstate highways ran. Exemptions were authorized under administrative regulation and the state highway commission did permit "trailer trains" to operate double-trailer trucks up to 100 feet long for certain purposes, including transporting of municipal refuse or waste, and also permitted com-

binations of three vehicles to transport milk to the point of its first processing. *Id.* at 434.

The trucking companies presented a great deal of evidence supporting their allegation that 65-foot doubles were as safe, if not safer, than 55-foot singles when operated on four-lane highways. *Id.* at 436-37. The state, however, made no effort to contradict this evidence. *Id.* at 437. The trucking companies also produced uncontradicted evidence showing that "their operations are disrupted, their costs are raised, and their service is slowed by the challenged regulations." *Id.* at 438.[3]

All of the eight Justices who took part in the decision agreed the Wisconsin statutory scheme violated the Commerce Clause,[4] but they divided evenly as to the approach courts should use in reviewing state highway safety regulations. Justice Powell, writing the opinion for the Court, used a "balancing" approach stating that "the inquiry necessarily involves a sensitive consideration of the weight and nature of the state regulatory concern in light of the extent of the burden imposed on the course of interstate commerce." *Id.* at 441. He reiterated the language in *Bibb* which required that those who challenge state regulations said to promote highway safety must overcome a "strong presumption of their validity," *id.* at 444, but found that the evidence produced on the safety issue was "so overwhelmingly one-sided" that the Court was "persuaded that the challenged regulations violate

3. In this regard, the Court observed that in order to comply with Wisconsin law, "an interstate double bound for Wisconsin must stop before entering the State and detach one of its two trailers." 434 U.S. at 438. One trucker maintained a crew of drivers in Wisconsin whose sole responsibility was to shuttle second trailers to and from the state line. *Id.*

4. Justice Stevens took no part in the consideration or decision of the case.

the Commerce Clause because they place a substantial burden on interstate commerce and they cannot be said to make more than the most speculative contribution to highway safety." *Id.* at 447. Justice Powell stated that the conclusion that the regulations cannot stand was buttressed "by the maze of exemptions from the general truck-length limit that the State itself allows." *Id.* at 445.[5]

Justice Blackmun wrote a concurring opinion for four members of the Court. Although he, too, accepted the concept that safety considerations must be balanced against burdens on interstate commerce, he wrote separately, apparently to emphasize the more limited role of the courts in such balancing. Whereas Justice Powell, for his group of four, had relied on *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), where the Court held the Commerce Clause prohibited Arizona from requiring locally produced cantaloupes to be crated there because the state's interest was not important enough to justify the burden on commerce, Justice Blackmun distinguished local regulations dealing with highway safety. He wrote, "[N]either the *Pike* opinion nor today's decision suggests that a similar balance would be struck when a State legitimately asserts the existence of a safety justification for a regulation." *Id.* at 449. He continued that, "if safety justifications are not illusory, the Court will not second-guess legislative judgment about their importance in comparison with related burdens on interstate commerce." *Id.* Justice Blackmun stated that he joined in

5. The Court noted in this regard that several of the exceptions discriminated in favor of Wisconsin industries and stated that "[e]xemptions of this kind . . . weaken the presumption in favor of the validity of the general limit, because they undermine the assumption that the State's own political processes will act as a check on local regulations that unduly burden interstate commerce." *Id.* at 447.

the opinion of the Court because the Court did not "engage in a balance of policies" nor "make a legislative choice." *Id.* at 450. He read the Court's opinion to signify that in light of the factual record developed by the parties, "the safety interests have not been shown to exist as a matter of law." *Id.*

More recently, in *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662 (1981), the Court considered an Iowa statutory scheme almost identical to the Wisconsin statute invalidated in *Raymond*. Again, there were exemptions permitted. Cities abutting the state line could adopt the length limitations of the adjoining state, which would permit oversized trucks to operate within the city limits and in nearby commercial zones. Iowa truck manufacturers could obtain a permit to ship trucks as large as 70 feet. Permits were also available to move oversized mobile homes, provided that the unit was to be moved from a point within Iowa or delivered for an Iowa resident.

The Court openly divided on the issue of which analytical approach to apply in examining the constitutionality of Iowa's scheme and no opinion was denominated as the Opinion of the Court. Justice Powell, joined by Justices White, Blackmun and Stevens, announced the judgment of the Court. His plurality opinion used the balancing approach. He acknowledged the strong presumption of validity given to regulations that touch upon safety, especially highway safety, but stated, "Regulations designed for that salutary purpose nevertheless may further the purpose so marginally, and interfere with commerce so substantially, as to be invalid under the Commerce Clause." *Id.* at 670. In undertaking to make that balance, Justice Powell acknowledged that Iowa introduced more evidence on the question of safety than did Wisconsin in *Raymond*. He found, however, that the record supported the finding by the district court

that 65-foot doubles were as safe as either 60-foot doubles or 55-foot singles and that the trucking company had demonstrated that Iowa's law substantially burdened interstate commerce. He noted that each of the other options available to trucking companies substantially increased the costs of trucking and might tend to increase the number of highway accidents because they entailed driving more highway mileage. He declined to defer to the state legislative judgment because the local regulation bore disproportionately on out-of-state residents and businesses in allowing several exemptions "that secure to Iowans many of the benefits of large trucks while shunting to neighboring States many of the costs associated with their use." *Id.* at 676.

Justice Brennan, joined by Justice Marshall, concurred in the judgment of the Court, but analyzed the case very differently, stating at the outset:

> For me, analysis of Commerce Clause challenges to state regulations must take into account three principles: (1) The courts are not empowered to second-guess the empirical judgments of lawmakers concerning the utility of legislation. (2) The burdens imposed on commerce must be balanced against the local benefits actually sought to be achieved by the State's lawmakers, and not against those suggested after the fact by counsel. (3) Protectionist legislation is unconstitutional under the Commerce Clause, even if the burdens and benefits are related to safety rather than economics.

Id. at 679-80. For Justice Brennan, the only relevant evidence "concerns whether the lawmakers could rationally have believed that the challenged regulation would foster" the "regulatory purposes identified by the lawmakers." *Id.*

at 680. He concurred in the judgment that the statute violated the Commerce Clause because he concluded that the actual goal of the Iowa legislature was to discourage interstate truck traffic on Iowa's highways and therefore the statute was unconstitutional "protectionist legislation". Significantly, Justice Brennan expressly rejected the balancing approach utilized by Justice Powell:

> Moreover, I would emphasize that *in the field of safety*—and perhaps in other fields where the decisions of state lawmakers are deserving of a heightened degree of deference—*the role of the courts is not to balance* asserted burdens against intended benefits as it is in other fields. . . . In the field of safety, once the court has established that the intended safety benefit is not illusory, insubstantial, or nonexistent, it must defer to the State's lawmakers on the appropriate balance to be struck against other interests. I therefore disagree with my Brother Powell when he asserts that the degree of interference with interstate commerce may in the first instance be "weighed" against the State's safety interests.

Id. at 681 n.1 (emphasis added).

In a dissenting opinion, Justice Rehnquist, joined by Chief Justice Burger and Justice Stewart, rejected both the weighing test of Justice Powell and Justice Brennan's emphasis on the actual purposes of the lawmakers. Emphasizing that "[t]he Commerce Clause is, after all, a grant of authority to Congress, not to the courts" and that those challenging a highway safety regulation must overcome a strong presumption of validity, he stated that the Court should not "directly compare safety benefits to commerce costs and strike down the legislation if the latter can be said in some vague sense to 'outweigh' the former."

Id. at 690-91. In his view the Court was limited "to determin[ing] if the asserted safety justification, although rational, is merely a pretext for discrimination against interstate commerce. We will conclude that it is if the safety benefits from the regulation are demonstrably trivial while the burden on commerce is great." *Id.* at 692. Justice Rehnquist framed the question as "whether it can be said that the benefits flowing to Iowa from a rational truck-length limitation are 'slight or problematical' ". *Id.* at 698. In his view, Iowa had adduced evidence sufficient to support its safety claim by showing that longer vehicles take greater time to pass, are more likely to clog intersections, and pose greater problems at accident scenes. *Id.* at 694-95.

In essence, therefore, this court must choose whether to apply the balancing approach used by Justice Powell or the highly deferential standard espoused by Justice Rehnquist. Although it is attractive to attempt to reconcile them, it would be presumptuous of us to try to do so since the Justices themselves have made explicit their belief that there are significant differences between them. It appears that the Justices have acknowledged, at least implicitly, that Justice Rehnquist's approach is even more deferential to the state's legislative judgments on highway safety issues than the balancing approach articulated by Justice Powell, notwithstanding the "strong presumption of validity" which the latter concedes is warranted. The district court recognized the choice before it. It stated that although it believed the weighing test employed by the plurality in *Kassel* was the proper analysis, it would follow "the narrow view" advocated by Justice Rehnquist in his *Kassel* dissent "rather than become embroiled in this controversy." 515 F. Supp. at 1338.

In some cases, perhaps in many cases, the choice between the two approaches which currently divide the

Supreme Court may not affect the result. In this case, we are not confident that the selection of the legal standard would not be outcome determinative. Therefore, we believe it is incumbent upon us to expressly select the standard to be applied. We choose to follow the approach articulated by Justice Rehnquist in his *Kassel* dissent for several reasons. In the first place, if we attempt to align the Justices, it appears that there are five Justices who have rejected the balancing approach in the area of safety regulations, if we count not only the three Justices adhering to Justice Rehnquist's opinion but Justice Brennan and Justice Marshall as well.[6] In the second place, we

---

6. In his *Kassel* opinion Justice Rehnquist noted that "a majority of the Court goes on record today as agreeing that courts in Commerce Clause cases do not sit to weigh safety benefits against burdens on commerce when the safety benefits are not illusory." 450 U.S. at 692 n.4. He also stated that "only four Justices invalidate Iowa's law on the basis of the analysis in *Raymond*." *Id.* at 700 n.10. Justice Powell, however, expressly noted his disagreement with this latter conclusion stating that the analysis in *Raymond* "was joined by each of the eight Justices who participated" and that "Justice Brennan finds it unnecessary to reach the *Raymond* analysis because he finds the Iowa statute to be flawed for a threshold reason." *Id.* at 679 n.27. We do not believe that the Court's decision in Sporhase v. Nebraska, 50 U.S.L.W. 5115 U.S. July 2, 1982 suggests that majority of the Justices would adopt a balancing approach in a case such as this one involving a nondiscriminatory highway safety regulation. *See* dissenting typescript op. at 2 n.1. In *Sporhase* the Court considered a Commerce Clause challenge to a Nebraska water conservation measure which placed restrictions on the withdrawal of ground water from any well within Nebraska intended for use in an adjoining state. In invalidating a portion of the statute, the Court focused on its "facially discriminatory" nature. *Id.* at 5120. Further, the case did not involve a challenge to a highway safety regulation, to which the Court has traditionally afforded a greater degree of deference than in other fields of state regulation.

believe that the more deferential standard is appropriate because issues of highway safety have always been considered of a "peculiarly local nature." *See Bibb*, 359 U.S. at 523. If the rational basis standard is considered adequate in equal protection cases for evaluating a wide range of state statutes and regulations, a similarly deferential standard should suffice as the standard for evaluating nondiscriminatory state commercial regulations in the field of highway safety.

Finally, we are particularly reluctant to superimpose judicial values over legislative values in the safety area. The balancing approach as applied in the plurality opinion in *Kassel* entailed making subtle distinctions on the basis of vigorously contested facts and inferences. We believe that the halls of the state legislature are a more appropriate forum for resolution of these disputes than are the walls of a judge's chambers. Because the legislative process itself involves balancing the benefits to the public interest against the restraints imposed on the affected businesses, many of whom are voters, the concern expressed by the dissent about hypothetical statutes requiring luminous trucks, a thirty-five mile per hour highway speed limit or weekly inspections, dissenting typescript op. at 6, are unlikely examples since they would have had to survive the legislature's scrutiny and debate. As long as the statute does not on its face or in fact discriminate against out-of-state interests or in favor of in-state interests, there is ample protection from such legislation in the democratic process itself. Therefore, we will review the record to determine whether the "strong presumption of validity" accorded Pennsylvania's highway safety measures has been overcome by a showing that the safety benefits were "slight or problematical" or, as alternatively but equivalently phrased, merely "illusory".

IV.

There was a mass of evidence introduced in this case by the parties on both sides. In addition to the one day of testimony before issuance of the temporary restraining order, the hearing on the preliminary injunction occupied four days and the hearing on the merits occupied another five days.

With regard to the nature and extent of the burden on interstate commerce, the district court found that 25 states and the District of Columbia have some type of periodic inspection program that would fulfill the requirements of section 4703(a)(2). Six of these states exempt from their inspection requirement interstate motor vehicles subject to regulation by the Federal Bureau of Motor Carrier Safety (BMCS). 515 F. Supp. at 1330. The court found that approximately 231,000 tractors and 700,000 trailers are not currently required to be inspected by any state, and thus, if operated in Pennsylvania, would be subject to its section 4703(a)(2) inspection requirement. *Id.* No state other than Pennsylvania requires inspection of vehicles registered in another state. *Id.*

The average tractor inspection was found to take at least 90 minutes and the average trailer inspection 30 minutes. *Id.* at 1332-33. The court noted that uninspected vehicles will often travel through Pennsylvania at night when many inspection stations will not be open, and that "[e]ven if a driver can find an inspection station, perishable items may be damaged because of the delay required by inspection." *Id.* at 1334. The out-of-pocket cost for each inspection of a semitrailer at an official inspection station ranges from $12 to $18, and there would be further costs connected with drivers' salaries and additional fuel consumption while taking vehicles to an inspection station. *Id.* at 1333. The court stated that if

the truckers were to circumvent Pennsylvania rather than getting an inspection, "[t]he costs of this choice are enormous in terms of additional time and fuel consumption." *Id.* at 1334.

Based on the costs and burdens associated with inspections, the district court found that the burden on interstate commerce is substantial. The court stated that "as in *Raymond*, [plaintiffs] 'produced uncontradicted evidence showing that their operations [would be] disrupted, their costs [would be] raised, and their service . . . slowed . . .' if the inspection statute is permitted to go into effect." *Id.* at 1340. The Commonwealth does not challenge the fact that interstate commerce is affected by the statute, but characterizes the effect as an "incidental impact". Commonwealth's brief at 7.

On the other hand, the Commonwealth vigorously challenges as clearly erroneous the district court's finding that section 4703(a)(2) was not a legitimate safety measure. Unlike the state in *Raymond* which "virtually defaulted in its defense of the regulations as a safety measure", *Raymond*, 434 U.S. at 444, Pennsylvania introduced a broad array of evidence designed to show that the statute was indeed a valid safety measure. The Commonwealth introduced evidence that: national and local accident statistics show a significant increase in the number of accidents involving motor carrier vehicles, App. at 1052, 1169-70; in inspections of interstate motor carrier vehicles on Pennsylvania highways conducted by the BMCS, with the assistance of the Pennsylvania State Police, a significant percentage of the vehicles were found to have defects which warranted their being placed out of service, App. at 1054-1107; 1113-1126; in comparison to all motor vehicles, motor carrier vehicles (large trucks, etc.) are involved in a disproportionately large number of accidents in Pennsylvania for which vehicle failure is

a factor contributing to the accident. App. at 1052-53; in Pennsylvania factors such as geography, climate, roadway design and topography interrelate to create special safety problems for truck travel upon Pennsylvania roads, App. at 831-850; Pennsylvania's inspection program is designed to and will correct and prevent mechanical failure and deterioration. App. at 657-684; and there is a relationship between low incidence of mechanical defects and periodic inspection. App. at 1175-1182. The truckers attacked the validity of the statistics, surveys and studies which had been introduced by the Commonwealth and also introduced evidence in their case in chief designed to show the illusory benefits of section 4703(a)(2).

There are two critical factual issues which emerge from the extensive evidence in this case. One is whether there is a relationship between mechanical defects in motor carrier vehicles and accidents, and the second is whether there is a relationship between inspection and the timely discovery of such mechanical defects. In finding that section 4703(a)(2) "has only illusory, slight, or problematical safety benefits," the district court found:

(1) "[N]o relationship is shown to exist between mechanical defects in vehicles and accidents caused by such vehicles." 515 F. Supp. at 1331; and

(2) "[S]emiannual or annual inspections of high mileage vehicles such as motor carrier vehicles are insufficient to discover and correct mechanical defects" because such inspections will only detect the condition of the vehicle at the time the inspection is made and do not guarantee the safety of a vehicle in the future. *Id.* at 1331-32. As a subsidiary finding, the court also found that "tractor-trailer combinations from non-inspecting states did not have a statistically disproportionate percentage

of accidents than tractor-trailer combinations registered in inspection states." *Id.* at 1331.[7]

The Commonwealth argues that the court's "inference" rejecting the relationship between mechanical defects and accidents "is founded upon an erroneous thesis and a misunderstanding of statistical evidence." Commonwealth's brief at 10. It is apparent from the district court's opinion that the court made the finding rejecting any relationship between mechanical defects and accidents on the basis of the disparity between the percentage of motor carrier vehicles found hazardous and placed out of service in selective and random BMCS inspections on Pennsylvania highways (between 40% and 60% of such vehicles) and the percentage of motor carrier vehicles involved in accidents which had a vehicle failure cited as a contributing cause (8.8%). However, we agree with the Commonwealth that there is no basis to assume that there should be a perfect or even a close correlation between these two figures. Some motor carrier vehicles traveling the highways with mechanical defects will get into accidents, but many others will not, for a variety of reasons. Also, the statistics compared by the district court do not come from comparable pools. The 8.8% figure came not from BMCS inspections but from police accident reports made by police officers who are primarily concerned with the emergency conditions at the accident scene and who therefore seldom undertake a serious examination of the vehicles. There was testimony that

---

7. The statistical evidence relied upon for this finding was challenged because assignment of combinations to states was made only on the basis of registration of the tractor, not the trailer, and because the accidents reported were not limited to those caused by mechanical failure. In our view of the issue, we believe it unnecessary to resolve the dispute as to this finding which we consider, at most, subsidiary.

the attribution of accidents to motor vehicle defects was understated and that the true figure would more realistically be in the 25% range. App. at 627.

The district court indicated that its conclusion of the lack of relationship between mechanical defects and accidents was also based at least in part on a motor vehicle inspection report issued by Pennsylvania's Office of Budget and Administration in January 1981 which stated that "the association between vehicle defects and motor vehicle accidents is, at best, tenuous." 515 F. Supp. at 1331 n.15. We believe reliance on that report was inappropriate. The report was not introduced into evidence at trial.[8] Although the district court stated it used that report only to "corroborate" the evidence presented at trial, *id.*, that report does not rise to the level of the evidence of which a district court may take judicial notice, particularly when the inferences and conclusions to be derived from its statements are subject to dispute. Even if the report could have been properly considered, it does not support the proposition for which it was used by the district court because it was not directed to motor carrier vehicles but to all motor vehicles, of which motor carrier vehicles comprise only a small percentage. The report did not recommend the elimination of all inspections, but only replacement of semiannual for annual inspection. App. at 1392. Unlike the district court, the Commonwealth did not interpret its own report to negate a connection between mechanical defects in motor carrier vehicles and accidents. Pennsylvania's Governor Thornburgh used the report as the basis for his proposal to replace twice-a-year inspection with once-a-year inspection for vehicles *other than* heavy trucks. App. at 1346. The

8. The motion of the intervenor in February 1981 to reopen the trial to introduce this report was denied. 515 F. Supp. at 1331 n.15.

Governor recommended that the twice-a-year inspection should continue as to heavy trucks, and the legislation passed in that manner. Act No. 1982-129 (May 26, 1982). Thus, Pennsylvania has manifested its continued belief in inspection of heavy trucks as a valid safety measure.

In making the finding that inspections will not discover mechanical defects, the district court made two points: all interstate carriers are already subject to the federal inspection requirements, set forth by the BMCS in 49 C.F.R. § 396, which require that motor carriers systematically inspect their vehicles and that truck drivers make safety reports and conduct certain daily self-inspections of their trucks, 515 F. Supp. at 1332; [9] and the deterioration and failure of motor carrier vehicles occur "slowly and progressively, without predictability of when a mechanical failure might occur," whereas an inspection will only detect the condition of the vehicle at the time the inspection is made. *Id.* The district court also noted that the Commonwealth's own expert, Dr. James Schuster, had testified that on high mileage motor carrier vehicles one inspection per year is not adequate. *Id.* at 1339 n.42.

The Commonwealth points out, however, that it introduced the sole testimony on the issue of the occurrence and progression of mechanical and structural failures in motor carrier vehicles and established, *inter alia*, the following: (1) that mechanical failures generally are slow and progressive in nature and that very few of the failures are instantaneous, App. at 665-66; and (2) that although the precise point of mechanical failure is not predictable, "the effects of this deterioration and failure [can] be detected by an inspection," App. at 666-67; and (3) that the Commonwealth's program will detect, correct and pre-

9. There has been no suggestion that the BMCS requirements have pre-empted state-imposed inspection requirements.

vent failure and deterioration "before they reach the final stage of failure," App. at 684. With regard to Dr. Schuster's testimony, it supports rather than disproves the Commonwealth's position, since Dr. Schuster actually testified that while a twice-a-year inspection requirement is reasonable for high mileage motor carrier vehicles, a once-a-year requirement (which section 4703(a)(2) would permit) "*alone* . . . is not adequate." App. at 882 (emphasis added). Since all interstate carriers are already subject to BMCS in-house self-inspection requirements, the Pennsylvania inspection requirement would never be imposed alone.

Pennsylvania's inspection requirement is significantly different than the regulations invalidated in *Bibb*, *Raymond*, and *Kassel*. Unlike the state law in *Bibb*, Pennsylvania's inspection requirement does not conflict with that of any other state. Pennsylvania does not require that the requisite inspection be performed under its own system, but instead accepts the inspection of any other state, under whatever standard that state imposes. Unlike the regulations in *Raymond*, Pennsylvania does not discriminate in favor of local industry,[10] and unlike the regu-

10. Plaintiffs' argument that the statute discriminates against out-of-state motor carriers because Pennsylvania motor carriers were already subject to a state inspection program misapprehends the issue. Discrimination against interstate commerce entails imposing a burden on out-of-state vehicles which is not imposed on in-state vehicles or favoring those from in-state without a comparable favor for those from out-of-state. Hunt v. Washington Apple Advertising Commission, 432 U.S. 333 (1977), relied upon by Plaintiff-ATA, is distinguishable. That case is more like *Bibb* since the North Carolina statute which required all closed containers of apples to display *only* the applicable U.S.D.A. grade was inconsistent with the practice of Washington state apple growers whose containers were preprinted with a different grade classification.

lations in *Kassel*, Pennsylvania's law does not contain exemptions which throw into question the legitimacy of its regulation system. If, as is likely, the principal function of the Commerce Clause today is to prevent discrimination against interstate commerce, then once it is conceded that there is no such discrimination, either facially or in application, the inquiry as to the burden on interstate commerce should end. *See* Eule, 91 Yale L.J. at 469-72.

From our review of all the evidence on the record, we believe that although the district court stated it was going to apply the highly deferential approach advocated by Justice Rehnquist, which we have also adopted, in fact it did not do so. Instead, there are clear indications from the opinion that the district court undertook to decide whether the evidence presented by the Commonwealth convinced it that inspections were desirable. In doing so, it imposed far too onerous a burden on the Commonwealth. For example, in rejecting the evidence of some relationship between mechanical defects and accidents, the court gave no credence to the surveys introduced by the Commonwealth which showed a relationship between a low incidence of mechanical defects and periodic inspections. 515 F. Supp. at 1331 n.13. While all of the surveys introduced in the record, whether by plaintiffs or the Commonwealth, suffer from serious flaws which undermine their utility, the district court failed to appreciate the significance of the Commonwealth's evidence, accepted by the district court, that 8.8% of the tractor-trailers involved in accidents in Pennsylvania during 1979 were reported to have had a vehicle failure as a factor contributing to the accident. Defendant's Exhibit No. 1. That figure in itself suggests that there is at least some correlation between accidents and mechanical defects. Other exhibits introduced by the

truckers themselves likewise show a correlation between accidents and mechanical defects. *See, e.g.*, ATA Exhibit No. 15 (App. at 1231) (PennDOT data showing that in 1978, 8.45% of the tractor-trailer accidents in Pennsylvania involved vehicle failure); ATA Exhibit No. 9 (App. at 1229) (BMCS report that a mechanical defect or failure was cited as involved in 4.9% of the 1976 interstate motor carrier accidents, 4.8% for 1977, and 4.7% for 1978).

It was not necessary for the state to prove that uninspected motor carrier vehicles are, by definition, unsafe, a burden that the district court appears to have imposed upon it. Instead, the state merely was obliged to show that the legislature had a reasonable basis to believe that inspection of motor carrier vehicles was likely to discover some defective vehicles and that some vehicle defects contribute to accidents. The Commonwealth produced more than sufficient evidence to support its claim that inspections of motor vehicles have some, even if not overwhelming, safety benefits. We need not decide whether that evidence would have convinced us that an inspection requirement was warranted, nor do we sit to decide the wisdom of the legislative decision. We believe the record shows that there was ample evidence to support the legislature's choice when reviewed under a standard giving substantial deference to the legislature.

It is even probable that were the evidence evaluated under the test which requires that the court weigh the interstate burden of a regulation against its safety benefits, Pennsylvania's inspection requirement would survive. In *Raymond*, the Court noted that the state had failed to make "a colorable showing" that its regulations contributed to highway safety. 434 U.S. at 447-48. It is difficult to conclude that Pennsylvania has not met that minimal requirement, particularly when it is balanced

against a burden on interstate commerce stemming merely from an inspection requirement rather than total exclusion, as in the case of oversized vehicles. The district court made no findings under this standard, and since we have adopted an even more deferential standard, we do not decide the issue.

V.

Because of our disposition of the Commerce Clause challenge, we must reach the appellees' Fourteenth Amendment arguments which the district court did not address. The intervenor, SOIC, argues that the statute violates equal protection and due process requirements because it regulates chassis used to transport steamship containers to and from ports in the United States while excluding automobiles. SOIC claims this "is totally arbitrary" in light of the testimony regarding their comparative safety. SOIC brief at 39. SOIC relies upon evidence establishing a very low incidence of accidents in which the contributing cause was related to defects in the chassis equipment. SOIC does not, however, cite to any evidence specifically comparing the safety record of chassis and automobiles. The Commonwealth, on the other hand, argues that the inclusion of chassis and the exclusion of automobiles need only be rationally related to the state's safety objectives and that there is no constitutional requirement that its regulation must reach every class to which it might be applied. This position is correct. "States are accorded wide latitude in the regulation of their local economies under their police powers, and rational distinctions may be made with substantially less than mathematical exactitude." *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976). The state is not obliged to ameliorate a perceived evil in one fell swoop.

The legislature could reasonably decide that tractor-trailer combinations, including those using a chassis rather than a trailer, represented a distinct category of vehicles with special safety problems which warranted a more stringent safety inspection requirement than imposed on automobiles. The Commonwealth introduced evidence showing a significantly higher percentage of mechanical defects cited as contributing factors in accidents involving tractor-trailer combinations than for all motor vehicles. App. at 360-61; 1052-53. There was a substantially higher increase in reported fatal and injury accidents involving tractor-trailer combinations than motor vehicles. App. at 358-59; 1052-53. The legislature also could reasonably have determined that vehicle weight is rationally related to highway safety, a fact recognized in the Supreme Court cases. *See, e.g., Maurer v. Hamilton*, 309 U.S. 598, 609 (1940); *Kassel*, 450 U.S. at 693-94 (Rehnquist, J., dissenting). The state was not obliged to present statistical evidence establishing a causal relation between the weight of a vehicle and the incidence of accidents caused by mechanical defects. *See Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 463-64 (1981).[11]

SOIC also contends that the statute violates the Due Process Clause because there is no evidence establishing that the out-of-state inspections acceptable under section 4703(a)(2) are comparable in their frequency and details with that required in Pennsylvania. According to SOIC, the statute's silence with regard to details of the other states' inspection programs means that the statute does not, as a matter of law, constitute an exercise of

11. We also reject as without merit the argument of the amicus curiae. Institute of International Container Lessors, Ltd., that the proposed regulations "exceed the requirements of the statute" because they require that chassis and trailers, as well as the towing vehicle, comply with the inspection provision.

Pennsylvania's police power which is reasonably calculated to promote public safety on its highways. Since we have already concluded that the Pennsylvania statutory scheme is reasonably related to safety, the legislature could reasonably have believed that compliance with at least some inspection program in some other state, albeit not as stringent as Pennsylvania's, would further its safety purposes, and represented a reasonable accommodation to truckers already inspected elsewhere

Finally, ATA contends that the statute violates the Due Process Clause on grounds of vagueness, claiming that Pennsylvania enforcement officials disagreed at trial as to whether the inspection programs of states such as New Jersey, Maryland, and California would satisfy the inspection requirement, and that the Act and regulations promulgated thereunder permit too much discretion in enforcement by the individual trooper regarding the five-day grace period given those vehicles which provide "adequate proof" that they have been outside the state for 30 days.

We do not believe that section 4703(a)(2) or its accompanying regulations are unconstitutionally vague. It is clear on the face of the statute that the provision prohibits motor carrier vehicles from operating on Pennsylvania highways without a valid certificate of inspection. The application of the statutory provision to particular states is a subject which may be clarified in future administrative regulations. "[W]hile there must be definiteness and ascertainable standards so that men of common intelligence can apprehend the meaning of the ordinance, perfect precision is neither possible nor constitutionally required." *Bykofsky v. Borough of Middletown*, 401 F. Supp. 1242, 1253 (M.D. Pa. 1975), *aff'd without opinion*, 535 F.2d 1245 (3rd Cir.), *cert. denied*, 429 U.S. 964 (1976). *See Grayned v. City of Rockford*, 408 U.S. 104

(1972). Furthermore, while the regulations vest some discretion in enforcement of the five-day grace period to officials, we do not believe the regulations have vested those officials with discretion which could lead to impermissible arbitrary enforcement. As the Supreme Court stated in *Grayned v. City of Rockford*, 408 U.S. at 114. "As always, enforcement requires the exercise of some degree of police judgment, but, as confined, that degree of judgment here is permissible."

For the foregoing reasons, we will reverse the judgment of the district court declaring the statute unconstitutional and enjoining its enforcement.

ADAMS, J., dissenting.

There is much in the majority opinion with which I agree. I have no difficulty, for example, with the proposition that states are entitled to considerable deference in their legitimate and nondiscriminatory attempts to promote safety on the highways. Similarly, I too believe that the judicial role in "dormant" commerce clause cases of this sort should be a relatively limited one, not only because courts generally are ill-equipped to evaluate the wisdom of legislation intended to promote safety, but also because Congress always retains the ability, through the exercise of its plenary powers, to invalidate any state regulation that it deems to be an intrusion on the commercial interests of the nation. Nonetheless, I do not join my colleagues in upholding the Pennsylvania truck inspection statute challenged here. My divergence from the majority can be briefly stated: I believe that the balancing test is the better of the two standards for resolving dormant commerce clause disputes and that when this test is applied, the balance weighs against the Commonwealth's legislative effort.

I

As the majority opinion aptly demonstrates, the Supreme Court has not yet arrived at an agreed-upon standard for determining the constitutionality of a state's safety-related legislation that allegedly interferes with interstate commerce. In essence, because a majority of the Justices has been unable to endorse either of the two competing tests,[1] "this court must choose whether to ap-

1. It is tempting to conclude, as does the majority in this case, *see* typescript op. at 16, that a majority of the Supreme Court in Kassel v. Consolidated Freightways Corp., 450 U.S. 662 (1981), rejected the use of a balancing test in evaluating the constitutionality of safety-related legislation. To be sure, three Justices (only two of whom, however, remain on the Court) sharply criticized the plurality's balancing approach. The significance of Justice Brennan's concurring opinion (which was joined by Justice Marshall) is more difficult to assess. Both Justices Brennan and Marshall joined the opinion of the Court in Raymond Motor Transp., Inc. v. Rice, 434 U.S. 429 (1978), in which a balancing test was employed. Then, too, Justice Brennan's concurring opinion in *Kassel* does not directly take issue with the observation of the plurality that "Justice Brennan finds it unnecessary to reach the *Raymond* analysis because he finds the Iowa statute to be flawed for a threshold reason" (*viz*, that the Iowa act constituted "protectionist legislation"), 450 U.S. at 679 n.27. Moreover, Justice Brennan's concurrence in *Kassel* stressed that the appropriate focus in commerce clause cases should be on "the [actual] regulatory purposes identified by the lawmakers and on the evidence before or available to them that might have supported their judgment." *Id.* at 680. With respect to the matter *sub judice*, however, no legislative discussion accompanied the Commonwealth's enactment of the truck inspection statute. *See* American Trucking Ass'ns, Inc. v. Larson, 515 F. Supp. 1327, 1329 n.4 (M.D. Pa. 1981). In *Kassel*, Justice Brennan emphasized that "[w]here there is no evidence bearing on the actual purpose for a legislative classification, our analysis necessarily focuses on the suggestions of counsel," and therefore " 'marginally more demanding scrutiny' is appropriate to 'test the plausibility of the tendered purpose.' " 450 U.S. at 682 n.3 (quoting Schweiker

ply the balancing approach used by Justice Powell or the highly deferential standard espoused by Justice Rehnquist." Majority opinion, typescript op. at 15.

For three reasons, my colleagues endorse the deferential standard of review; that is, they accord the Pennsylvania inspection statute a "strong presumption of validity" and ultimately conclude that the plaintiffs here were unable to demonstrate that the safety benefits intended to be realized by the measure were "slight," "problematic," or "illusory." *Id.* at 16. First, the majority notes that five justices appear to have rejected the legitimacy of balancing competing interests when safety regulations are involved. As previously discussed, however, *see* note 1 *supra*, I do not believe it can be said that either of the two competing approaches has received the imprimatur of a Supreme Court majority. Second, my colleagues contend that, as long as the rational relation standard of review is considered adequate in assessing the constitutionality of various state commercial statutes and regulations, a "similarly deferential standard" is in order when reviewing highway safety legislation of a "peculiarly local nature." I of course cannot quarrel with the notion that the "bite" of judicial review should be at a minimum in those situations in which a state draws distinctions among its citizens that neither impinge upon a fundamental right nor discriminate against a suspect class. *See Murillo v.*

NOTE — *(Continued)*

v. Wilson, 450 U.S. 221, 245 (1981) (Powell, J., dissenting)). A reading of the relevant cases, then, convinces me that to date no single approach to the commerce clause has attracted a majority of the Justices. I also note that, very recently, seven Justices joined in applying the balancing test (as set forth in Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970)) to a state statute deemed by the Court to fall into the "health and safety regulation" category. *See* Sporhase v. Nebraska, 50 U.S.L.W. 5115, 5119 (U.S. July 2, 1982).

Bambrick, No. 81-1786 (3d Cir. June 17, 1982). I am not convinced, however, that the equal protection analogy applies with respect to commerce clause questions: after all, when a state acts to burden interstate commerce, whatever its motivations, it affects the activities and interests not only of its own citizens, but also those of unrepresented outsiders (such as the truckers complaining in the matter at bar). It is not improbable, therefore, that an economic policy that might appear rational from the perspective of the enacting state would be antithetical to the commercial interests of the nation as a whole.[2] Third and finally, the majority suggests that "the halls of the state legislature are a more appropriate forum for resolution of [highway safety] disputes than are the walls of a judge's chambers." Typescript op. at 16. I am not persuaded, however, that absolute judicial reticence is appropriate when reviewing the actions of *state* legislatures, whose safety-related judgments, essentially attuned to local considerations, do not necessarily reflect an adequate comprehension or consideration of the burdens placed on interstate intercourse.[3]

---

2. *See, e.g.*, Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 527 (1935) ("one state in its dealings with another may not place itself in a position of economic isolation" because "[r]estrictions so contrived are an unreasonable clog upon the mobility of commerce"); *The Supreme Court, 1980 Term*, 95 Harv. L. Rev. 91, 101-02 (1981) (arguing that increased state economic regulation, and the resulting nonuniformity, may undercut federal efforts at deregulation and may force the Court "to defend national interests more strenuously in the future").

3. It has been maintained, *see* Kassel v. Consolidated Freightways Corp., 450 U.S. 662, 690 (1981) (Rehnquist, J., dissenting); Eule, *Laying the Dormant Commerce Clause to Rest*, 91 Yale L.J. 425, 435-37 (1982), that courts should defer to state regulations that impinge on interstate commerce, on the ground that, with

In my view, the better analytical approach to dormant commerce clause matters is the "sensitive" balancing advocated by the plurality in *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662 (1981).[4] Under this standard, "the incantation of a purpose to promote the public health

---

NOTE — *(Continued)*

respect to any given state statute, non-action by Congress must imply consent. To date, however, the Supreme Court has neither endorsed nor demanded this type of judicial restraint. Moreover, it is arguable that increased judicial deference would be unwise because, at least as a de facto matter, for many years Congress has deferred to the federal courts to police and protect the commercial interests of the nation. *See* Gibbons, *Keynote Address, Symposium: Constitutional Adjudication and Democratic Theory*, 56 N.Y.U. L. Rev. 260, 264-65 (1981) (defending the Supreme Court's dormant commerce clause jurisprudence on the ground that "[u]sually the Court majority believed it was expressing the true will of the *national* majority") (emphasis added).

4. The balancing test favored by the *Kassel* plurality can be traced to Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520 (1959), in which the Court invalidated an Illinois requirement (unique to that State) that truckers install contoured mudflaps on their vehicles. According to the Justices, because " 'the total effect of the law as a safety measure in reducing accidents and casualties is so slight or problematical as not to outweigh the national interest in keeping interstate commerce free from interferences which seriously impede it,' " the statute could not be upheld. *Id.* at 524 (quoting Southern Pac. Co. v. Arizona, 325 U.S. 761, 775-76 (1945)). The *Bibb* standard was invoked and refined in Raymond Motor Transp., Inc. v. Rice, 434 U.S. 429 (1978) (invalidating a Wisconsin statute governing the length and configuration of trucks): "Our recent decisions make clear that the inquiry necessarily involves a sensitive consideration of the weight and nature of the state regulatory concern in light of the extent of the burden imposed on the course of interstate commerce." *Id.* at 441; *see also* Edgar v. Mite Corp., 50 U.S.L.W. 4767, 4771-72 (U.S. June 23, 1982); Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970).

or safety does not insulate a state law from Commerce Clause attack." *Id.* at 670. Rather, a reviewing court is obligated to engage in a careful " 'weighing of the asserted safety purpose against the degree of interference with interstate commerce.' " *Id.* (quoting *Raymond Motor Transportation, Inc. v. Rice*, 434 U.S. 429, 443 (1978)). Ordinarily, because of their "strong presumption of validity," *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520, 524 (1959), state and local regulations intended to advance highway safety will withstand constitutional attack. In some—admittedly rare—cases, however, state restrictions may "further the [safety] purpose so marginally, and interfere with commerce so substantially, as to be invalid under the Commerce Clause." *Kassel*, 450 U.S. at 670.

The reason for favoring the balancing over the deferential test derives from a recognition that situations may arise where enormous burdens are placed on interstate commerce by nondiscriminatory, non-illusory state safety statutes. In these instances, I believe it unwise and imprudent for a federal court to ignore significant and sizeable infringements on national commercial interests solely because some, arguably marginal, local safety objective is served. A few examples may suffice. It doubtless would increase highway safety were a state to mandate that all trucks traveling on its roads be covered with luminous paint, be driven at speeds not to exceed thirty-five miles per hour, or be inspected weekly. Under the deferential standard of commerce clause review, having made such a determination, a court's inquiry must end. It is troubling, however, to accept an analysis that excludes from the decisionmaking calculus the tremendous burdens placed on interstate commerce by each of these (rather fanciful) regulations. Indeed, it is difficult to reconcile such an approach with the long-standing notion that the commerce clause exists, in part, to "prevent[] the

States from erecting barriers to the free flow of interstate commerce," *Raymond Motor, supra,* 434 U.S. at 440; *see Great Atlantic and Pacific Tea Co. v. Cottrell,* 424 U.S. 366, 370-71 (1976) (citing cases).

In my opinion, the better judicial practice would take into account costs as well as benefits; it would balance local safety objectives against "the national interest in keeping interstate commerce free from interferences which seriously impede it," *Bibb, supra,* 359 U.S. at 524. *See The Supreme Court, 1980 Term, supra* note 2, at 102 (recommending that the Supreme Court "candidly balanc[e] the interests involved" in dormant commerce clause cases, because "[a]lthough a state's interest in safety may be legitimate, it may still be unreasonable in light of the burden . . . imposed on interstate commerce"). Such a stance, it seems to me, comes closest to realizing the Framers' conviction that "in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation." *Hughes v. Oklahoma,* 441 U.S. 322, 325-26 (1979); *see H.P. Hood & Sons, Inc. v. Du Mond,* 336 U.S. 525, 533-34 (1949).

II

If, then, a balancing standard is to be applied in the matter at bar, I believe that the Pennsylvania statute challenged here cannot survive constitutional scrutiny. The most striking fact that emerges from the testimony and evidence introduced at trial, in my view, is the overwhelming burden placed on interstate commerce by the Commonwealth's highway regulation. The district court found that, once the inspection requirement took effect, nearly one million out-of-state vehicles, currently not re-

quired to be examined by any state, would be affected.[5] *American Trucking Associations, Inc. v. Larson*, 515 F. Supp. 1327, 1330 (M.D. Pa. 1981). Assuming, of course, that their owners chose not to avoid Pennsylvania highways entirely,[6] these tractors and trailers would have to be inspected, either in the Commonwealth or elsewhere, in order to be operated in accordance with the law on Pennsylvania's roads.

The inspections themselves, according to the district court, involve "considerable costs and delays," *id.* at 1332—a proposition with which the Commonwealth does not take issue. For example, the district court found that: "[t]he cost for each inspection of a semitrailer at an official inspection station ranges from $12.00 to $18.00"; "[t]here also would be further costs connected with drivers' salaries and additional fuel consumption while taking motor carrier vehicles to an inspection station, waiting during the inspection, and returning the vehicle to the owners' place of business or back to its intended course of travel"; "[t]he average tractor inspection takes at least ninety minutes and the average trailer or semitrailer in-

5. In fact, this one million figure may represent an underestimation of the actual impact of the Commonwealth's inspection program. The district court found that, although 25 states currently have "some type of periodic inspection program." 6 states exempt from inspection all interstate motor carrier vehicles subject to regulation by the federal Bureau of Motor Carrier Safety (BMCS), and several states have "atypical inspection procedures." *American Trucking, supra*, 515 F. Supp. at 1330.

6. Given the strategic geographic location of the Commonwealth, it is difficult to imagine that circumnavigation would constitue a viable option for most interstate motor carriers. Nonetheless, the district court found that, if this alternative were seriously pursued, the resulting additional transportation costs (measured in both money and time) would be "enormous." *American Trucking, supra*, 515 F. Supp. at 1334.

spection about thirty minutes"; "perishable items may be damaged because of the delay required by inspection"; inspection stations are not open at night, when much of the interstate truck traffic occurs. The district court also credited testimony that one, presumably representative, trucking company (Coastal Tank Lines) would be forced to expend more than $150,000 annually in order to comply with the Pennsylvania statute. *Id.* at 1332-34.[7] It is difficult to quarrel with the conclusions drawn by the district court from the record compiled in this case: that the truckers "'produced uncontradicted evidence showing that their operations [would be] disrupted, their costs [would be] raised, and their service . . . slowed' if the inspection statute is permitted to go into effect," and that therefore "the Pennsylvania law places substantial burdens on interstate commerce." *Id.* at 1332, 1340 (quoting *Raymond Motor, supra,* 434 U.S. at 438).

Although the question is close, I would not disturb the district court's finding that Pennsylvania failed to demonstrate that its inspection program would bring about

---

7. Additionally, although the district court made no specific findings with respect to these charges, the record contains other, generally unrebutted, allegations by the plaintiffs as to burdens imposed on interstate commerce by the Commonwealth's inspection requirement: many companies would be forced to purchase additional vehicles in order to prevent a dimunition or cessation of service during the time when their existing trucks are being inspected; it is questionable whether the Commonwealth has a sufficient number of service stations to handle the marked increase in periodic inspections; because of "prohibitive" costs associated with the inspection process, a number of trucking companies allegedly would be forced to discontinue or suspend service to Pennsylvania and other east coast areas, leading to greater unemployment in the region; many companies reported the costs they expected to incur in complying with the Pennsylvania law to be far in excess of the $150,000 figure identified by Coastal as its annual cost.

anything other than "insubstantial, slight, and problematical benefits," *American Trucking, supra*, 515 F. Supp. at 1338. To be sure, it borders on the intuitive that, at least in some cases, careful inspection of a vehicle may reveal a mechanical defect which, had it gone undetected, might have resulted in an accident. But, as the district court found, interstate trucks already are subject to rigorous inspection requirements: all interstate carriers must satisfy the directives relating to inspection, maintenance, and repair of their vehicles set forth by the federal Bureau of Motor Carrier Safety (BMCS), *see* 49 C.F.R. § 396 (1981).[8] Indeed, trial testimony established that "motor carriers typically inspect their vehicles from 4 to 12 times per year depending upon vehicle usage, region of the country, and other factors," 515 F. Supp. at 1332. The appropriate inquiry, therefore, at least under the balancing test, is not whether annual or semiannual examinations of otherwise-uninspected trucks will increase highway safety, but rather whether the *incremental* (and arguably cumulative) inspections mandated by Pennsylvania will be accompanied by safety gains of a magnitude sufficient to justify the rather sizeable restrictions placed on interstate commerce by the statute.

---

8. According to the district court, "[u]nder BMCS regulations, every motor carrier must require its drivers to prepare a report at the completion of each day's work with the vehicle covering [specified] parts and accessories"; "[a]ny defects or deficiencies affecting the safety of operation of the motor vehicle or resulting in its mechanical breakdown must be reported by the driver"; "[b]efore a driver takes out a motor carrier vehicle, he must . . . visually inspect it, satisfy himself that it is in safe operating condition, review the most recent inspection report carried on the vehicle, and sign the report only if . . . [the] safety-related defects or deficiencies have been repaired." *American Trucking, supra*, 515 F. Supp. at 1332.

Despite the mass of evidence introduced by both sides, the record is barren of any indication that the Commonwealth's periodic inspection requirement will lead to a significant decrease in the accident rates for motor carrier vehicles. As the district court observed, because inspections "will only detect the condition of the vehicle at the time the inspection is made," and because structural and mechanical deterioration occurs "slowly and progressively" over time, "[m]echanical failures can and do occur without warning and despite inspection of the vehicle." *Id.* at 1332, 1338. From this and other evidence, the district court concluded that "inspections do not lead to a reduction in accidents caused by mechanical failures." *Id.* at 1332. While such a conclusion might be somewhat overstated, unlike the majority I do not believe it is clearly erroneous, given that the far more frequent BMCS-mandated inspections currently required are unable to prevent many defect-related accidents.

In this connection, it is worth noting that the Commonwealth's own Report on Motor Vehicle Inspection, dated January 1981, concluded that "it is unlikely that [periodic motor vehicle inspection] actually can prevent those outages or failures, or substantially reduce the number of frequently occurring component defects existing in vehicles in use on public highways." According to the Report, "this study confirms the findings of several others which have concluded that accident rates among states with annual and semiannual inspections are essentially the same as those in states with no vehicle inspection programs." *Id.* at 1331 n.17 & 1332 n.23. As the majority notes, *see* typescript op. at 21-22, this report questioned the virtue of inspections for all vehicles—including, but not specifically considering, trucks—and therefore may not be directly on point. Nonetheless, in my view, the

study's findings serve to buttress the conclusions about truck inspections drawn from the record in this case by the district court.[9]

I am not persuaded, moreover, by three evidentiary items relied on by the Commonwealth in support of its argument that periodic inspections will reduce motor carrier vehicle accident rates. First, for the reasons identified by the district court, *see American Trucking, supra,* 515 F. Supp. at 1330 n.13, the results of various on-site examinations conducted by BMCS and Pennsylvania do not demonstrate that mandatory inspections increase highway safety. As the majority recognizes, typescript op. at 25, all of these surveys "suffer from serious flaws which undermine their utility." Second, Pennsylvania—and the majority, *see id.*—emphasize that 8.8% of the tractor-trailers involved in accidents in the Commonwealth in 1979 had a vehicle failure cited as a contributing cause. This statistic does no more than state the problem, however; nothing in the record indicates that the percentage will decrease once additional (and arguably cumulative) vehicle inspections are under way. Finally, Pennsylvania—and the majority, *see id.* at 23—stress expert testimony to the effect that potential mechanical failures can be detected by an inspection and that the Commonwealth's envisioned program "will detect, prevent, [and] correct conditions before they reach the final stage of failure." Appendix at 666, 684. This testimony, while of course helpful to the Commonwealth, does not go to what I consider to be the crucial question: whether the newly ordered inspections will increase highway safety *to a degree sufficient to justify*

9. The fact that the Report was not introduced into evidence, and therefore arguably cannot be employed to support a holding, does not mean a court is without power to use this public document, as did the district court, to corroborate an already-arrived-at result.

the sizeable burdens placed on interstate commerce by the statute.

In sum, in the absence of a showing on the part of the Commonwealth that its inspection effort, if implemented, would measurably decrease the number of accidents involving interstate trucks, I would hold that, under the balancing test, the undisputed burdens on interstate commerce resulting from Pennsylvania's inspection program outweigh what the district court found to be speculative and unsubstantiated promises of improved highway safety.[10]

III

For more than a century, the Supreme Court has recognized that, under certain circumstances, the commerce clause can serve as an affirmative limitation on the regulatory powers of the states, even in the absence of preemptive national legislation in a particular area. *See, e.g., Cooley v. Board of Wardens*, 53 U.S. (12 How.) 299 (1851); *The Passenger Cases*, 48 U.S. (7 How.) 283 (1849). In the words of Justice Frankfurter,

> the Commerce Clause was not merely an authorization to Congress to enact laws for the protection and encouragement of commerce among the States, but

10. I am constrained to note that, if I agreed with the majority that the deferential standard of commerce clause review is preferable to the balancing test, in my opinion Pennsylvania would prevail on this appeal. While I believe that the evidence proffered by the Commonwealth in support of its inspection proposal is insufficient to offset the truckers' showing of a sizeable negative impact on interstate commerce, I simply cannot conclude that the safety benefits to be realized by the Pennsylvania legislation are "illusory" or "demonstrably trivial" (quoting Kassel v. Consolidated Freightways Corp., 450 U.S. 662, 692 (1982) (Rehnquist, J., dissenting)). The majority implies, *see* typescript op. at 15, that selection of the appropriate level of review in this matter is "outcome determinative." I agree.

> by its own force created an area of trade free from interference by the States. . . . [T]he Commerce Clause even without implementing legislation by Congress is a limitation upon the power of the States.

Freeman v. Hewit, 329 U.S. 249, 252 (1946).

There can be no doubt that Pennsylvania, like every other state, has an interest in increasing the safety of its highways; there also can be no doubt that the Commonwealth is entitled to "great leeway" in acting to realize this objective. *See Railway Express Agency, Inc. v. New York*, 336 U.S. 106, 111 (1949). In the *Bibb-Raymond Motor-Kassel* trilogy, however, the Supreme Court stressed that, even in the traditionally local domain of highway safety regulation, states cannot unduly fetter commercial interchange within the Union. As a result of today's decision, Pennsylvania will be the only state in the nation to restrict access to its highways to those trucks that have received a state-sponsored safety inspection.[11] In my view, this action will have a considerable negative impact on interstate commerce, and Pennsylvania has been unable to demonstrate safety benefits sufficient to offset this burden. Accordingly, I conclude that "[t]his is one of those cases—few in number—where local safety measures that are nondiscriminatory place an unconstitutional burden on interstate commerce." *Bibb, supra*, 359 U.S. at 529. Thus, I respectfully dissent.

---

11. "A State which insists on a design out of line with the requirements of almost all the other States may sometimes place a great burden of delay and inconvenience on those interstate motor carriers entering or crossing its territory. Such a new safety device —out of line with the requirements of the other States—may be so compelling that the innovating State need not be the one to give way. But the present showing—balanced against the clear burden on commerce—is far too inconclusive." Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520, 529-30 (1959).

IN THE

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

CIVIL ACTION No. 80-899

AMERICAN TRUCKING ASSOCIATIONS, INC., PENNSYLVANIA MOTOR TRUCK ASSOCIATION, MARYLAND MOTOR TRUCK ASSOCIATION, COASTAL TANK LINES, INC., CRST, INC., SMITH TRANSFER CORP., RYDER TRUCK LINES, INC., and PRESTON TRUCKING CORP.,
Plaintiffs

v.

THOMAS D. LARSON, Secretary of the Department of Transportation of the Commonwealth of Pennsylvania, et al.,
Defendants

STEAMSHIP OPERATORS INTERMODAL COMMITTEE,
Plaintiff-Intervenor

OPINION AND ORDER

I. INTRODUCTION

Plaintiffs initiated this action to challenge the constitutionality of section 4703(a)(2) of the Pennsylvania Motor Vehicle Code, 75 Pa. C.S.A. § 4703(a)(2), *as amended*, Act of June 18, 1980, No. 68, 1980 Pennsylvania Legislative Service 191, which requires all motor carrier

vehicles[1] operating on the highways of Pennsylvania to display "a currently valid certificate of inspection" issued by Pennsylvania or another state.[2] Thus, under the Act all such vehicles, whether in interstate or intrastate commerce and whether registered or not registered in Pennsylvania, must comply with the periodic inspection law of some state.

Plaintiff American Trucking Associations, Inc. ("ATA") located in Washington, D.C., is a federation composed of state trucking associations such as Plaintiffs Pennsylvania Motor Truck Association and Maryland Motor Truck Association. The remaining Plaintiffs—Coastal Tank Lines, Inc., CRST, Inc., Smith Transfer Corp., Ryder Truck Lines, Inc. and Preston Trucking Corp.—conduct trucking operations in interstate commerce by motor carrier vehicles that haul various commodities including chemicals, petroleum products, iron and steel products, perishable goods, and other general commodities.[3] Plaintiff-Intervenor Steamship Operators Intermodal Committee ("SOIC") is an unincorporated association whose members are common carriers by water and are engaged in the intermodal transportation of containerized cargo in the interstate and foreign commerce of the United States. Among SOIC's thirty-nine members are Sea-Land Service, United States Line, Farrell Lines,

1. The Act defines a "motor carrier vehicle" as "a truck, truck tractor or combination having a gross weight or registered gross weight in excess of 17,000 pounds." 75 Pa. C.S.A. § 102, *as amended*.

2. This subsection, in its entirety, provides:

> No motor carrier vehicle shall be operated on a highway unless it displays a currently valid certificate of inspection issued under this chapter or by another state.

75 Pa. C.S.A. § 4703(a)(2), *as amended*.

3. Hereafter, unless specifically noted, all references to ATA shall apply to all Plaintiffs collectively.

Maersk Line, Barber Lines, Orient Overseas Container Line, Zim Israel and Moore-McCormick Lines. The Defendant public officials empowered to administer and enforce the statute, are the Secretary of the Department of Transportation, the Attorney General of the Commonwealth, and the Commissioner of the Pennsylvania State Police.

ATA and SOIC contend that the inspection provision at issue here imposes an enormous burden upon interstate commerce and that the alleged contribution to highway safety is purely illusory. Furthermore, ATA claims that the statute is vague, and thus, violates the due process clause of the Fourteenth Amendment because it allows administrative employees of the Commonwealth to use unfettered discretion in the interpretation and enforcement of the provision. In addition, SOIC contends that the statute imposes an arbitrary classification without a rational basis and that the state has insufficient inspection stations to inspect all the vehicles which would have to be inspected under the law.

The complaint was filed on August 18, 1980 asking for injunctive relief and for a judgment declaring unconstitutional section 4703(a)(2) of the Pennsylvania Motor Vehicle Code, 75 Pa. C.S.A. §4703(a)(2) *as amended.* At the same time Plaintiffs asked for a preliminary injunction and a temporary restraining order enjoining the enforcement of the section in question.

After hearing, the temporary restraining order was granted and on September 2, Steamship Operators Intermodal Committee was permitted to intervene.

Beginning on September 8 a four-day hearing was held on the request for a preliminary injunction, the trial on the merits having been advanced and consolidated with this hearing. The preliminary injunction was granted at the end of the hearing on September 12, and November 3 was the date fixed for further hearing on the merits.

After five days of further hearings, the studying of briefs and oral argument and the full consideration of all of the facts and the law relative thereto, the court concludes and its judgment is that 75 Pa. C.S.A. § 4703(a)(2) imposes an unconstitutional burden on interstate commerce and accordingly a declaratory judgment and a permanent injunction against the enforcement of 75 Pa. C.S.A. § 4703(a)(2) will issue.

II. Findings of Fact

Pursuant to 75 Pa. C.S.A. § 4703(a)(2), all motor carrier vehicles operating on Pennsylvania highways must display a currently valid certificate of inspection.[4] This

4. ATA emphasized that the Act containing 75 Pa. C.S.A. § 4703 (a)(2) was originally proposed as a bill to regulate studded snow tires. The provision in question here only appeared after being referred to a Senate/House Conference Committee. Furthermore, ATA maintains that the section was adopted without legislative discussion of its purpose or impact upon highway safety, and thus, should receive less deference as a safety provision. We disagree. A statute which promotes highway safety has no less impact on such safety whether or not it was discussed by the legislature prior to its enactment. As the Supreme Court said in *Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522 (1959),

> We cannot assume that state legislative enactments were adopted arbitrarily or without good reason to further some legitimate policy of the State. What were the special reasons, motives or policies of the Ohio Legislature for adopting the questioned proviso we do not know with certainty, nor is it important that we should, Southwestern Oil Co. v. Texas, 217 US 114, 126, for a state legislature need not explicitly declare its purpose.

Id. at 528. We think any other interpretation would be contrary to the principle that all state legislative enactments are presumed constitutional. *See, McDonald v. Board of Election*, 394 U.S. 802 (1969); *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520, 524 (1959).

certificate can be obtained through compliance with the inspection laws of Pennsylvania or another state.[5] Al-

5. Under the authority conferred in 75 Pa. C.S.A. § 6103(a), *as amended*, Act of June 18, 1980, No. 67, 1980 Pa. Leg. Serv. 187, Defendant Larson, Secretary of the Department of Transportation caused to be published the following proposed regulation:

MEANING AND EFFECT OF
VEHICLE CODE SECTION 4703(a)(2) AND (c)

Section 494.1. Purpose and Authority

(a) Purpose.—This chapter is promulgated to provide drivers and owners of vehicles, enforcement personnel and the courts with an analysis of the meaning and effect of Vehicle Code Section 4703(a)(2) and (c).

(b) Authority.—This chapter is promulgated under authority of Section 6103 of the Vehicle Code.

Section 494.2. Combinations—Both the towing vehicle and the trailer in a combination having a gross weight or registered gross weight in excess of 17,000 lbs. shall comply with the provisions of Section 4703(a)(2) and (c) of the Vehicle Code and this chapter. Section 494.3 Display of valid certificate of inspection from another state. Vehicles, including elements of a combination, will be regarded as displaying a currently valid certificate of inspection issued by another state, IF:

(1) The vehicle was required to be inspected as a pre-requisite to registration and bears a currently valid registration plate, or

(2) The driver exhibits on request of any police officer or a Department employee engaged in weighing vehicles a currently valid document issued in accordance with the law or regulation of another state evidencing that the vehicle has been inspected.

Section 494.4. Vehicles reentering this Commonwealth. Vehicles, including elements of a combination, which have been outside this Commonwealth continuously for 30 days or more and which, at the time of reentering this Commonwealth, do not bear a currently valid certificate of inspection shall be inspected within five days of reentering this Commonwealth. The driver of the vehicle shall be

though considerable controversy existed concerning which states have inspection programs that would fulfill the requirements of the statute, the evidence demonstrated that 25 states and the District of Columbia have some type of periodic inspection program.[6] Six of these states, however, exempt interstate motor carrier vehicles subject to regulation by the Federal Bureau of Motor Carrier Safety ("BMCS") from the requirements of that state's inspection law.[7] Several other states have atypical inspection procedures, such as New Jersey, which requires inspection for registration,[8] or Maryland, which requires inspection only in the event of retitling with an undated certificate of inspection given upon request.[9] *None* of these states, how-

NOTE — *(Continued)*

required, at the request of a police officer or Department employee engaged in weighing vehicles, to provide adequate proof that the vehicle has been outside this Commonwealth continuously for at least 30 days.

6. In addition to Pennsylvania, the following states have inspection programs that require inspection of motor carrier vehicles Arkansas, Colorado, Delaware, Florida, Georgia, Hawaii, Illinois, Louisiana, Maine, Massachusetts, Mississippi, Missouri, Nebraska, New Hampshire, New York, North Carolina, Oklahoma, Rhode Island, South Carolina, Texas, Utah, Vermont, Virginia, and West Virginia. Defendants' Ex. #12.

7. This exemption applies in Florida, Illinois, Mississippi, Missouri, Nebraska and South Carolina. ATA Ex. #4, Trial Transcript ("Tr.") 25-26. Section 60-1701 of the Nebraska inspection statute has been declared unconstitutional. *Nebraska v. Edmunds*, Doc. 108 No. 163 (Douglas County Dist. Ct., Nebraska, filed Sept. 22, 1980). ATA Ex. #28, Tr. 516.

8. Since New Jersey only imposes marginal requirements on inspectors, it is questionable whether such inspections would meet Pennsylvania requirements. Tr. 767-74.

9. Tr. 438. This same requirement exists in Iowa. Tr. 777-7.

ever, require inspection of vehicles registered in another state. Regardless of these inspection programs as they now exist, approximately 231,000 tractors and 700,000 trailers, including chassis owned by members of SOIC, are currently not required to be inspected by any state, and thus, if operated in Pennsylvania would be subject to the Pennsylvania inspection scheme.[10]

The purported purpose of this inspection provision is to improve highway safety in Pennsylvania.[11] The Commonwealth's inspection program for motor carrier vehicles includes a periodic verification of the vehicle's registration and an inspection of the vehicle's brakes, tires, wheels, glazing, mirrors, operating controls, lighting, body, sheet metal, and the suspension, steering, fuel, exhaust and electrical systems.[12] In selective and random highway checks conducted by the Federal Bureau of Motor Carrier Safety and the Pennsylvania Department of Transportation of commercial interstate vehicles, between 40 and 60 percent of such vehicles were found hazardous and placed out of service.[13] Yet, during 1979, only 8.80 percent of the motor

10. ATA Ex. 4.

11. Pennsylvania statistics indicated that during the last 6 years fatal accidents increased 2.2% and injury accidents not resulting in a fatality have increased 9.3%. During the same period, the number of tractor-trailer combinations involved in fatal crashes had increased 60.4% and in injury accidents had increased 30.5%. Defendants' Ex. 1.

12. ATA Ex. 19.

13. BMCS with the assistance of the Pennsylvania State Police conducted three inspections of interstate commercial vehicles on Interstate-80 near Berwick, Pennsylvania. During the first inspection from August 7 to 11, 1978, 676 vehicles were inspected and 352 or 52% were placed out of service. Defendants' Ex. 3. From September 18 to 22, 1978, BMCS inspected 273 vehicles and placed 155 or 57% out of service. Defendants' Ex. 2. In the third inspection from May 21 to 23, 1979, 291 vehicles were inspected and 169

carrier vehicles involved in accidents had a vehicle failure cited as a *contributing* cause.[14] Thus, no relationship is shown to exist between mechanical defects in vehicles and

NOTE — *(Continued)*

or 58% placed out of service. Defendants' Ex. 4. In each of these inspections, BMCS used a prescreening selection procedure, which was described in the BMCS report as follows:

> The selective method involves a visible and audible prescreening by the Federal inspector to determine if there are obvious signs of defects. If during this cursory examination a deficiency is noted, a thorough inspection of the vehicle and driver documentation is performed.
>
> The selective prescreening inspection procedure is intended to identify as many defective vehicles as possible during the inspection period. *The prescreening inspection procedure is not intended to produce statistically valid measurements about the number or percent of defective vehicles on the highway.*

Defendants' Ex. 4 (emphasis added).

BMCS conducted similar inspections at various service plazas on the Pennsylvania turnpike between October 16 and 18, 1978. Again, the prescreening procedure was employed by inspectors. 168 vehicles were inspected and 95 or 57% were placed out of service. Defendants' Ex. 5. Yet, in both the Berwick inspections and the turnpike inspections, there was no distinction made between vehicles registered in inspection states and those registered in non-inspection states. Thus, such statistics do not provide evidence that mandatory periodical inspections increase highway safety.

The Commonwealth, however, conducted two subsequent surveys in an effort to show a relationship between a low incidence of mechanical defects and periodic inspection. But these surveys suffered from many significant procedural problems. The inspectors lacked training; there were many inaccurate and incomplete inspection forms; and many forms failed to indicate whether or not the vehicle inspected came from an inspection state or a non-inspection state. All of these matters tended to reduce the statistical validity of the result and we find that the numbers that the Commonwealth produced from these inspections are meaningless.

14. Defendant Ex. 1.

accidents caused by such vehicles.[15] Similar evidence demonstrates that tractor-trailer combinations from non-inspecting states did not have a statistically disproportionate percentage of accidents than tractor-trailer combinations registered in inspection states. Although 45.48 percent of all tractors were registered in inspection states, they accounted for 43.84 percent of the fatal accidents in 1979 involving tractor-trailers. Likewise, while 40.66 percent of all tractors were registered in non-inspection states, 37.94 percent of the fatal accidents in 1979 involved such tractor-trailers. Only tractors from states with an interstate inspection exception exceeded their proportion of the tractor population with 13.86 percent of tractor registrations but 18.22 percent of all fatal accidents.[16] This evidence also suggests that no correlation exists between mandatory periodical inspections and highway safety.[17]

15. This finding is supported by a recent Commonwealth report which concluded "[w]hile this indicates that the vehicle inspection program is successful in identifying vehicle defects, the present study has shown that the association between vehicle defects and motor vehicle accidents is, at best, tenuous." Commonwealth of Pennsylvania, Office of Budget and Administration, Report on Motor Vehicle Inspection, p. 30 (January 1981), SOIC Ex. 13. At oral argument held on February 26, 1981, SOIC moved to reopen the trial for the sole purpose of introducing this report into evidence. Although we denied this request, we have quoted from the report, a public document, in several footnotes. Our use of the report, however, is only to corroborate the evidence that was previously presented in this action.

16. Tr. 950-52, ATA Ex. 35. Tractor registrations based on 1977 data.

17. Again, we compare our findings to the conclusion reached in the Commonwealth's recent study.

> The major conclusion of this study is that semiannual motor vehicle inspection is not a cost-effective means of controlling motor vehicle accident rates. *In fact, this study con-*

Indeed, semiannual or annual inspections of high mileage vehicles such as motor carrier vehicles are insufficient to discover and correct mechanical defects. Trucking companies would have to continue in-house inspections.[18] Such inspections might consist of the mandatory systematic inspection, repair and maintenance of all motor vehicles subject to BMCS control. Under BMCS regulations, every motor carrier must require its drivers to prepare a report at the completion of each day's work with the vehicle covering at least the following parts and accessories: service brakes, including trailer brake connections; parking (hand) brakes; steering mechanism, lighting devices and reflectors; tires; horn; windshield wipers; rear vision mirrors; coupling devices; wheels and rims; and emergency equipment. 49 C.F.R. § 396.11. Any defects or deficiencies affecting the safety of operation of the motor vehicle or resulting in its mechanical breakdown must be reported by the driver. Before the motor carrier vehicle may be operated again, any such defects or deficiencies must be repaired and a certification to that effect submitted. *Id.* § 396.11(c). Before a driver takes out a

NOTE — *(Continued)*

> *firms the findings of several others which have concluded that accident rates among states with annual and semiannual inspections are essentially the same as those in states with no vehicle inspection programs after basic socioeconomic, demographic, environmental and highway differences are taken into account.* The study further concludes that since the frequency of vehicle inspection has no measurable influence on motor vehicle accident rates, a reduction in the frequency of vehicle inspection could be accomplished without an appreciable decline in traffic safety.

Report on Motor Vehicle Inspection, *supra* note 15 at 35 (emphasis added.).

18. Tr. 868.

motor carrier vehicle, he must under § 396.13 visually inspect it, satisfy himself that it is in safe operating condition, review the most recent inspection report carried on the vehicle, and sign the report only if he finds a certification that any safety-related defects or deficiencies have been repaired.[19] Although BMCS imposes no mandatory inspection interval, motor carriers typically inspect their vehicles from 4 to 12 times per year depending upon vehicle usage, region of the country, and other factors that differ for each motor carrier vehicle.[20]

The reason that semiannual inspections are inadequate to improve highway safety is because of the processes of deterioration and failure which affect the structural and mechanical components of all motor carrier vehicles. The deterioration and failure of these vehicles occurs slowly and progressively, without predictability of when a mechanical failure might occur.[21] An inspection, however, will only detect the condition of the vehicle at the time the inspection is made.[22] Thus, such inspections do not lead to a reduction in accidents caused by mechanical failures.[23]

---

19. Tr. 54-55, 65-66.

20. Tr. 56-57, 86-87, 114-16, 125-27. Defendants, however, suggest those BMCS standards are ignored by owners of motor carrier vehicles because of economic considerations in maintaining such vehicles and foregoing inspections to keep such vehicles on the highways. This court fails to discern any difference between the BMCS procedures and fleet inspection permitted under the Pennsylvania inspection law. Both rely on the honesty of the owner in performing inspections. But under the fleet inspection the owner must pay the Commonwealth for his "certificate of inspection."

21. Tr. 622-23.

22. Tr. 647.

23. As indicated in the Commonwealth report,

> [A]lthough existing brake system or tire outages may be detected by the inspection process, most brake or tire failures

ATA and SOIC demonstrated that the Pennsylvania law places substantial burdens on interstate commerce. Section 4703(a)(2) requires the trucking and containerized shipping industries to make a choice among various alternatives, including (1) inspection of their vehicles in Pennsylvania, (2) inspection of their vehicles in another inspection state, or (3) diverting motor carrier vehicles around Pennsylvania. Any of these methods of complying with the law imposes substantial costs and delays upon interstate and foreign commerce.

If these companies choose either the first or second method, they will incur considerable costs and delays associated with the inspections. The average tractor inspection takes at least ninety minutes and the average trailer or semitrailer inspection about thirty minutes.[24] The cost for each inspection of a semitrailer at an official inspection station ranges from $12.00 to $18.00.[25] There also would be further costs connected with drivers' salaries and additional fuel consumption while taking motor carrier vehicles to an inspection station, waiting during the

---

NOTE — *(Continued)*

> probably cannot be prevented because they also have the tendency to occur without warning.
>
> From this discussion it appears that while periodic motor vehicle inspection may be relatively successful in detecting certain component outages or failures, *it is unlikely that PMVI [periodic motor vehicle inspection] actually can prevent those outages or failures, or substantially reduce the number of frequently occurring component defects existing in vehicles in use on public highways.*

Report on Motor Vehicle Inspections, *supra* note 15 at 31 (emphasis added).

24. Tr. 33.

25. Tr. 41.

inspection, and returning the vehicle to the owners' place of business or back to its intended course of travel.[26]

Although many vehicles would probably be inspected outside of Pennsylvania, it is clear that owners of such vehicles cannot identify every vehicle that will travel through Pennsylvania. This results from several factors. First, tractors and trailers are not "wed" together. Instead, tractors and trailers are randomly and frequently interchanged and are rarely combined for more than one or two consecutive movements at a time.[27] Second, many commercial and industrial businesses have begun to use trucks as "rolling warehouses" or "inventory in motion."[28] In most instances, Coastal Tank Lines will receive its order to transport goods only a day in advance in which time it must pick up, transport, and deliver the load.[29] Similarly, automobile assembly plants, such as the Volkswagen plant in New Stanton, Pennsylvania, maintain a very limited supply of parts on hand. This reduction in inventory requires truckers to deliver parts precisely when

26. For example, Coastal Tank Lines ("Coastal") estimated its extra costs on the basis of 772 trailers and 333 tractors without certificates of inspection. Coastal has determined that compliance with the inspection requirement could best be accomplished by detouring these vehicles to its fleet inspection station in Coraopolis, Pennsylvania. The diversion from I-80 to Coraopolis and back is 150 miles. At about 5 miles per gallon, this detour for each motor carrier vehicle would consume about 30 gallons of diesel fuel. Coastal determined that the detour to Coraopolis would require 3 hours, plus 2½ hours for a complete inspection of tractor and trailer, and an additional hour delay because of the volume of equipment. Thus, the estimated annual cost to Coastal would be $43,418 in mechanics' wages, $62,857 in total drivers' wages, and $46,000 in additional fuel costs. Tr. 86-94.

27. Tr. 96.

28. Tr. 129, 279.

29. Tr. 91.

they are needed. A failure to deliver these parts on time could lead to shutdowns of the production line at a cost of $6,000 per minute.[30] Finally, the growth of the containerized cargo industry has made it difficult to determine which vehicles will move through particular states.[31]

30. Tr. 228-32. The Department of Defense has also adopted this "inventory in motion" concept to supply military hardware and subsistence items to United States bases in Europe. Much of this cargo originates at the New Cumberland Army Depot and the Defense Depot in Mechanicsburg, Pennsylvania. This method of supplying European bases would be seriously jeopardized by any disruption of service. Tr. 274-84.

31. See the following testimony of William R. Delaney, General Manager of Intermodel Services for Maersk Line.

BY MR. BARKAN (Counsel for SOIC):

Q. Is it possible in the loading and unloading process . . . [t]o match up chassis which are certified under the new Pennsylvania statute—or may be certified under the new Pennsylvania statute—with containers that will find their way into Pennsylvania?

A. No, sir.

Q. Or through Pennsylvania?

A. No, sir, it can't be done.

BY THE COURT:

Q. In other words, to operate under this new law, as far as you are concerned, all 8,000 of your chassis would have to be inspected in Pennsylvania or in another state that Pennsylvania recognizes. Is that right?

A. Yes, sir, in order to comply with this law, yes, sir.

BY MR. BARKAN:

Q. When a container is shipped from overseas and a bill of lading is issued, it goes to a port city in the United States, is that correct, as defined by you earlier?

A. That's one mode, yes, sir.

Q. Is it possible in all instances to tell whether or not a particular container will be going to Pennsylvania?

A. No, sir, not at all.

Q. Can you explain why not?

Thus, companies engaged in trucking and shipping cannot predetermine which vehicles must be inspected.

Furthermore, if drivers take such uninspected vehicles through Pennsylvania, it will often be late at night when interstate motor carriers travel. At these times, many inspection stations will not be open.[32] Even if a driver can find an inspection station, perishable items may be damaged because of the delay required by inspection.[33]

Instead of getting an inspection, the trucking industry could choose to circumvent Pennsylvania. The costs of this choice are enormous in terms of additional time and fuel consumption. CRST, for example, estimated its additional costs for discontinuing usage of three routes through Pennsylvania that it currently utilizes: Interstate 80, Interstate 70, and the Pennsylvania Turnpike. The

---

NOTE — *(Continued)*

A. Certain of the traffic moves on odd bills of lading where we don't even know the address of the ultimate consignee that is the beneficial owner of the goods. Some goods are bought and sold in transit and is [sic] subject to diversion rules after the vessel is already en route.

And still more traffic is tendered to the truckman as a final delivery at the port city. But he may then, on his own bill of lading, transport that container to any place within the United States. Or pretty much anywhere within North America. He has an interchange agreement with Maersk Line or with the ocean carrier, he has an interchange receipt and safety inspection report. And he is paying per diem for that unit.

So within the bounds of good business judgment, he can drive that container any place he wants to.

And the account may have wanted delivery in Philadelphia but subsequently we sold it even without touching it to somebody in Ohio. Or vice versa, for that matter.

Tr. 174-76. *See also* Tr. 236.

32. Tr. 514-15.

33. Tr. 130.

additional difference in miles from Akron, Ohio to New York City not using I-80 is 210 miles, the difference from Akron to Philadelphia and New Jersey not using the Pennsylvania Turnpike is 160 miles, and the difference from Akron to Maryland not using I-70 is 76 miles. The additional fuel required per load from Akron to New York City would be 41.2 gallons; to Philadelphia, 31.4 gallons; to Maryland, 14.9 gallons. The trip from Akron to New York City would take 4.6 hours longer at 45 mph; to Philadelphia 3.6 hours longer; to Maryland, 1.7 hours longer. Increased costs per load on refrigerated trailers to New York City would be $179.55; to Philadelphia, $136.80; to Maryland, $64.98. On flatbed operations, they are $170.52, $129.92, and $61.72, respectively.[34]

III. Discussion

1. *The Commerce Clause*

Although the Commerce Clause is recognized as both a source of congressional power[35] and a limitation on states' authority even when Congress has not acted, the extent to which the Clause prevents states from erecting barriers to interstate commerce is the subject of considerable controversy, particularly in the area of highway safety legislation. It is true that the Commerce Clause does not prevent states from enacting nondiscriminatory legislation designed to serve legitimate state interests even though it affects the flow of interstate commerce. Nevertheless, "in areas where activities of legitimate local concern overlap with the national interests expressed by the Commerce Clause—where local and national powers are concurrent—the Court in the absence of congressional guidance

34. Tr. 109-113.

35. "The Congress shall have Power . . . To regulate Commerce . . . among the several States." U.S. Const. art. I, § 8, cl. 3.

is called upon to make 'delicate adjustment of the conflicting state and federal claims,' *H.P. Hood & Sons, Inc. v. Du Mond*, [336 U.S. 525], at 553, (Black, J., dissenting), thereby attempting 'the necessary accommodation between local needs and the overriding requirement of freedom for the national commerce.' *Freeman v. Hewit*, [329 U.S. 249], at 253." *A & P Tea Co. v. Cottrell*, 424 U.S. 366, 371 (1976). The current controversy centers upon the degree to which courts should make this "delicate adjustment," which has also been referred to as a "sentitive consideration." The nature of this problem is apparent in two recent decisions by the Supreme Court, *Raymond Motor Transportation, Inc. v. Rice*, 434 U.S. 429 (1978) and *Kassel v. Consolidated Freightways Corp.*, 49 U.S.L.W. 4328 (1981), both of which questioned the constitutionality of state limitations on truck lengths.

Raymond involved a challenge to Wisconsin's administrative regulations governing the length and configuration of trucks that may be operated on Wisconsin highways. The regulations limited the overall length of a tractor pulling a single trailer to 55 feet. All single trailer units ("singles") longer than 55 feet and all tractors pulling more than one trailer ("doubles") were prohibited from operating on the highway without a permit. These regulations, however, had numerous exceptions which permitted the use of many vehicles over 55 feet, in fact to lengths up to 100 feet. While the trucking companies introduced much evidence indicating that 65-foot doubles were as safe as 55-foot singles, Wisconsin made no effort to contradict this evidence of comparative safety.

Although the Supreme Court rendered a unanimous decision, the Justices were evenly divided [36] with respect

36. Justice Stevens took no part in the consideration or decision of that case.

to the approach courts should use in Commerce Clause cases. In the Court's opinion, written by Justice Powell, the Court maintained that the inquiry regarding permissible and impermissible impacts on interstate commerce "necessarily involves a sensitive consideration of the weight and nature of the state regulatory concern in light of the extent of the burden imposed on the course of interstate commerce." 434 U.S. at 441. This sensitive consideration required a weighing approach similar to the one advanced in *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970) ("Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits."). While state regulations promoting highway safety have a "strong presumption of validity," *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520, 524 (1955), Wisconsin had "virtually defaulted in its defense of the regulations as a safety measure." *Raymond, supra*, 434 U.S. at 444. Therefore, the Court was "persuaded that the challenged regulations violate the Commerce Clause because they place a substantial burden on interstate commerce and they cannot be said to make more than the most speculative contribution to highway safety." *Id.* at 447.

In a concurring opinion, Justice Blackmun, however, emphasized the narrow scope of the *Raymond* decision. Justice Blackmun specifically rejected any attempt to balance or weigh legitimate safety justifications against the burden on interstate commerce. Rather, he maintained that the Court should restrict its analysis to whether the purported safety interest actually existed.

> In other words, if safety justifications are not illusory, the Court will not second-guess legislative judgment

about their importance in comparison with related burdens on interstate commerce. . . . Here, the Court does not engage in a balance of policies; it does not make a legislative choice. Instead, after searching the factual record developed by the parties, it concludes that the safety interests have not been shown to exist as a matter of law.

434 U.S. at 449-50 (Blackmun, J., concurring).

The dust had barely settled in *Raymond*, when Consolidated Freightways Corporation of Delaware initiated an action to have Iowa's 60-foot limitation on doubles declared unconstitutional as it applied to certain interstate highways, access routes to Consolidated's terminals, and reasonable access to facilities for food, fuel, repairs or rest. Unlike the defendants in *Raymond*, Iowa attempted to seriously support the safety justifications of the 60-foot maximum on doubles. The district court, however, found:

> Twins and semis have different characteristics. Twins are more maneuverable, are less sensitive to wind, and create less splash and spray. However, they are more likely than semis to jackknife or upset. They can be backed only for a short distance. The negative characteristics are not such that they render the twin less safe than semis overall. Semis are more stable but are more likely to "rear end" another vehicle.
>
> The added length of the twin is not a substantial factor on four lane divided highways. The state by legalizing the 65 foot automobile carrier has weakened its claim that the extra length creates a safety hazzard. It has practically destroyed its argument that double trailers are an additional safety hazard by legalizing the 60 foot twin. The uncontradicted

> evidence established that the extra five feet in length makes the 65 foot twin more stable than the 60 foot twin.

475 F. Supp. 544, 549 (S.D. Iowa 1979). Thus, the court concluded that "[t]he evidence convincingly, if not overwhelmingly, established that the 65 foot twin is as safe as, if not safer than, the 60 foot twin and the 55 foot semi." *Id.* at 548. Since the legislation had only a "slight or problematical" safety benefit, which did not outweigh the burdens on interstate commerce, the court held the statute unconstitutional. The Court of Appeals for the Eighth Circuit affirmed. 612 F.2d 1064 (8th Cir. 1979).

When *Consolidated Freightways* reached the Supreme Court, the Justices were again divided on the issue of which analytical approach to apply to this question. By this time, the Justices, however, had split into three groups, none of which represented a majority of the court.[37]

---

37. For this reason, Justice Rehnquist suggested, perhaps correctly, that *Consolidated Freightways* has little legal significance.

> The true problem with today's decision is that it gives no guidance whatsoever to these States as to whether their laws are valid or how to defend them. For that matter, the decision gives no guidance to Consolidated or other trucking firms either. Perhaps, after all is said and done, the Court today neither says nor does very much at all. We know only that Iowa's law is invalid and that the jurisprudence of the "negative side" of the Commerce Clause remains hopelessly confused.

49 U.S.L.W. at 4339 (Rehnquist, J. dissenting). *See also* Note, PLURALITY DECISIONS AND JUDICIAL DECISIONMAKING, 94 Harv. L. Rev. 1127, 1128 (1981), in which the author stated:

> The Supreme Court has a role beyond that of resolving individual disputes; it serves as a guide for private parties, legislatures, lower courts, and its own future decisions. In order to perform this function adequately the Court must pro-

Justice Powell, announcing the judgment of the Court, delivered a plurality opinion advocating the weighing approach.[38] Although the plurality recognized the strong presumption of validity given to safety statutes, they would not stop their analysis merely because the state asserted a public safety purpose. As Justice Powell explained:

> But the incantation of a purpose to promote the public health or safety does not insulate a state law from Commerce Clause attack. Regulations designed for that salutary purpose nevertheless may further the purpose so marginally, and interfere with commerce so substantially, as to be invalid under the Commerce Clause. In the Court's recent unanimous decision in *Raymond*, we declined to "accept the State's contention that the inquiry under the Commerce Clause is ended without a weighing of the asserted safety purpose against the degree of interference with interstate commerce." This "weighing" by a court requires—and indeed the constitutionality of the state regulation depends on—"a sensitive consideration of the weight and nature of the state regulatory concern in light of the extent of the burden imposed on the course of interstate commerce."

49 U.S.L.W. at 4330 (citations and footnote omitted). Employing these principles, the plurality found that the

NOTE — *(Continued)*

vide definitive statements of the law. More than a mere agreement on the result is needed; without a majority rationale for the result, the Supreme Court abdicates its responsibility to the institutions and parties depending on it for direction. Each plurality decision thus represents a failure to fulfill the Court's obligations.

38. Justice Powell was joined by Justice White, Justice Blackmun, and Justice Stevens.

record supported the district court's determination that 65 foot twins were as safe as 60 foot twins or 55 foot semis. Thus, while the 60-foot limitation on doubles is a substantial burden on interstate commerce, Iowa's safety interest was merely illusory.

Although Justice Brennan concurred in the judgment of the Court,[39] he examined the case quite differently. According to Justice Brennan,

> [A]nalysis of Commerce Clause challenges to state regulations must take into account three principles:
>
> (1) The courts are not empowered to second-guess the empirical judgments of lawmakers concerning the utility of legislation. (2) The burdens imposed on commerce must be balanced against the local benefits actually sought to be achieved by the State's lawmakers, and not against those suggested after the fact by counsel. (3) Protectionist legislation is unconstitutional under the Commerce Clause, even if the burdens and benefits are related to safety rather than economics.

Id. at 4332. Thus, Justice Brennan would have courts "balance the burden imposed on commerce against the local benefits sought to be achieved by the State's *lawmakers*." *Id.* (emphasis original). Because Justice Brennan concluded that the goal of the Iowa legislature was to discourage interstate truck traffic on Iowa's highways, the statute is unconstitutional as protectionist legislation. Nevertheless, Justice Brennan would hold that courts may rely upon *post hoc* justifications of counsel when "there is no evidence bearing on the actual purpose for a legislative classification . . . ." *Id.* at 4333, n. 3, but even

39. Justice Marshall joined Brennan's opinion concurring in the judgment of the Court.

when such *post hoc* justifications may be considered, Justice Brennan would limit the court's role. As Justice Brennan noted:

> Moreover, I would emphasize that in the field of safety—and perhaps in other fields where the decisions of State lawmakers are deserving of a heightened degree of deference—the role of the courts is not to balance asserted burdens against intended benefits as it is in other fields. In the field of safety, once the court has established that the intended safety benefit is not illusory, insubstantial, or nonexistent, it must defer to the State's lawmakers on the appropriate balance to be struck against other interests. I therefore disagree with my Brother Powell when he asserts that the degree of interference with interstate commerce may in the first instance be "weighed" against the State's safety interests . . . .

Id. at 4333, n. 1 (citations omitted). Thus, at least in this respect, Justice Brennan would follow the approach advanced by Justice Blackmun's concurring opinion in *Raymond*.

In a dissenting opinion, Justice Rehnquist rejected both the "weighing test" adopted by the plurality and Justice Brennan's consideration of the actual purposes identified by the legislature.[40] While acknowledging that courts must make a " 'sensitive consideration' of the safety purpose in relation to the burden on commerce," *Id.* at 4335, Justice Rehnquist began his analysis with the view that "Iowa must simply show a relation between vehicle length limits and safety, and that the benefits from its length limit are not illusory. *Id.* at 4337, n. 8. Thus, he

40. Chief Justice Burger and Justice Stewart joined in this dissent.

would not compare the safety characteristics of a 65-foot double with those of a 60-foot double or a 55-foot single. Instead, it is sufficient for Iowa to produce evidence showing that longer vehicles take greater time to pass, are more likely to clog intersections, and pose greater problems at the scene of an accident. Having presented evidence showing that truck length affects highway safety, Justice Rehnquist would allow the state to make its own choice concerning the appropriate truck length which the state will adopt. "Since the adoption of one weight or width regulation, rather than another, is a legislative and not a judicial choice, its constitutionality is not to be determined by weighing in the judicial scales the merits of the legislative choice and rejecting it if the weight of evidence presented in court appears to favor a different standard." *Id.* at 4337, *quoting South Carolina State Highway Department v. Barnwell Brothers, Inc.*, 303 U.S. 177, 191 (1938). At this point, Justice Rehnquist advocated making a sensitive consideration without weighing the conflicting interests "to determine if the asserted safety justification, although rational, is merely a pretext for discrimination against interstate commerce." When safety benefits are trivial and the burden on commerce is substantial, courts should conclude that the safety justifications are a pretext. 49 U.S.L.W. at 4336.

Although this court is persuaded that the weighing test employed by the plurality in *Consolidated Freightways* is the proper analysis by which courts should determine Commerce Clause issues, we hesitate to follow this approach because of the inconclusive nature of the various opinions. As Justice Rehnquist pointed out, "[i]t should not escape notice that a majority of the Court goes on record today as agreeing that courts in Commerce Clause cases do not sit to weigh safety benefits against burdens on commerce when the safety benefits are not illusory."

Id. at 4336, n. 4. Instead, rather than become embroiled in this controversy, we shall follow the narrow view expressed by Justice Rehnquist. Thus, this court will inquire whether the Pennsylvania legislature acted rationally in regulating vehicle inspections and whether the safety benefits are more than slight or problematical. This decision, however, does not alter the ultimate outcome in this action because we are convinced that this periodic inspection statute, which substantially burdens interstate commerce, has, at best, insubstantial, slight, and problematical benefits.

2. *The State Safety Interest*

As Justice Rehnquist has observed, "[t]he whole purpose of safety regulation of vehicles is to *protect* the State from unsafe vehicles." *Id.* at 4339 (emphasis original). Indeed, we have no doubt that Pennsylvania may constitutionally prevent unsafe vehicles from traversing upon its highways. For example, pursuant to 75 Pa. C.S.A. § 4704(c),

> In the event a vehicle, in the reasonable judgment of the officer, is in such condition that further operation would be hazardous, the officer may require that the vehicle not be operated under its own power . . . .

Pennsylvania, however, seeks to equate "unsafe vehicles" to those motor carrier vehicles that do not bear a valid certificate of inspection. While Pennsylvania attempted to demonstrate by means of statistical evidence and expert testimony that periodic inspection promotes highway safety, we conclude that the relationship between such inspection and highway safety is dubious.

The structural and mechanical components of all motor carrier vehicles are subject to the processes of de-

terioration and failure. An examination of the vehicle *may* detect such deterioration. Thus, at the time of the inspection, the owner may correct defects in the vehicle. Yet, the evidence indicates that such inspections do not guarantee the safety of a vehicle in the future. Mechanical failures can and do occur without warning and despite inspection of the vehicle.[41] Furthermore, under Pennsylvania's inspection requirements, owners of motor carrier vehicles could comply with the law by inspection in a state which only requires an annual inspection. Thus, these vehicles, many of which are driven over 100,000 miles a year, would only require one inspection per year. Even Pennsylvania's expert witness stated that on such high mileage vehicles, an annual inspection was inadequate.[42]

---

41. *See* n. 23 *supra*.

42. Testimony of Dr. James J. Schuster, Professor of Civil Engineering, Villanova University:

Q. I also understand from your testimony that one inspection is good, two inspections would be better and more inspections would be better still?

A. Yes, sir, more inspections do enhance safety.

Q. If the carriers inspected their tractors every 25,000 miles, that would be better than having them inspected once a year, would it not?

A. Depending on how many miles travelled per year.

Q. The testimony has been in this case that most interstate trucks travel 105,000 miles a year.

A. Yes.

Q. And it would be far better and far safer for tractors to be inspected every 25,000 miles or every two months than it would be to have them inspected once a year?

A. Yes. But from an engineering viewpoint, you have the idea of feasibility. Daily rigorous inspections are good, but you have to reach the point of what is feasible, what is reasonable. And I think twice a year is reasonable.

In addition, the statistical evidence failed to demonstrate that inspected vehicles were safer than non-inspected vehicles. As we previously indicated, the BMCS studies did not differentiate between motor carrier vehicles with and without certificates of inspection. In addition, those studies were clearly not intended for use as statistically valid measurements. The surveys conducted by Pennsylvania in response to this litigation fail to disclose any highway safety benefits of mandatory periodic inspection. First, the procedural aspects of the study are suspect. Second, the surveys only identify mechanical defects without demonstrating a link between defects and accidents.[43] Furthermore, the statistical evidence relating to accidents failed to indicate that inspected motor carrier vehicles were safer than uninspected

---

NOTE — *(Continued)*

Q. Once a year is more reasonable than twice a year?
A. No, I said twice a year is reasonable to me.
Q. How about once a year?
A. Not as reasonable. I would prefer two, myself.
Q. Is it adequate?
A. Once a year?
Q. Yes.
A. In certain circumstances, yes.
Q. I mean for a vehicle going 105,000 miles?
A. *That alone, just that inspection, is not adequate, no.*
Q. You recognize that this law would permit tractors who get one inspection a year to travel the highways of Pennsylvania without anything else?
A. I will assume that fleets and individuals wouldn't simply say: Well, this inspection takes care of everything. There is a certain responsibility, the driver has, the mechanics have for in-house inspections that should be done in addition to this.
Tr. 867-68 (emphasis added).

43. *See* n. 13 *supra*.

motor carrier vehicles.[44] This finding was supported by Pennsylvania's own study concerning the effectiveness of periodic inspections.[45] From this review of the record, we conclude that the mandatory periodic inspection of all motor carrier vehicles required by 75 Pa. C.S.A. § 4703 (a)(2) is not a rational safety measure and that the alleged safety burdens are illusory and insubstantial.

3. *Burdens on Interstate Commerce*

In making our sensitive consideration of the purported safety benefits in relation to the burden on interstate commerce, it is clear that these insubstantial benefits are trivial while the burden on such commerce is substantial. Indeed, by requiring motor carrier vehicles to exit interstate highways to find an inspection station, the statute may actually increase the hazards of highway travel. *See Consolidated Freightways*, 49 U.S.L.W. at 4334 (Brennan, J., concurring). Furthermore, trucking and shipping companies will incur considerable expense associated with inspection, drivers' wages, and extra fuel consumption. "Cost taken into consideration with other factors might be relevant in some cases to the issue of burden on commerce. *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. at 526. *See also Raymond*, 434 U.S. at 445 ("The regulations substantially increase the cost of [interstate] movement, a fact which is not . . . entirely irrelevant."). Thus, as in *Raymond*, *ATA* and *SOIC* "produced uncontradicted evidence showing that their operations [would be] disrupted, their cost [would be] raised, and their service . . . slowed . . ." if the inspection statute is permitted to go into effect. 434 U.S. at 438. Therefore, we conclude that the strong presumption of validity accorded to this

44. See p. 8-9 *supra*.

45. See n. 17 *supra*.

legislation has been overcome and that the statute violates the Commerce Clause.[46]

IV. Conclusion

On the basis of the foregoing, which constitutes the court's findings of fact and conclusion of law, see Rule 52(a) of the Federal Rules of Civil Procedure, we conclude that 75 Pa. C.S.A. § 4703(a)(2) has only illusory, slight, or problematical safety benefits while it imposes substantial burdens on interstate commerce. Therefore, we shall grant declaratory and injunctive relief in favor of the Plaintiffs.

An appropriate order will be entered.

/s/ R. Dixon Herman
R. Dixon Herman
United States District Judge

Dated: June 10th, 1981

---

46. Several alternate arguments have been raised in this action. First, ATA contends that the statute violates the due process clause of the Fourteenth Amendment on grounds of vagueness. Second, SOIC maintains that including chassis while excluding automobiles is an arbitrary classification because of their comparative safety. Finally, SOIC claims that the statute is fundamentally unfair in violation of the due process clause because the number of inspection stations in Pennsylvania is inadequate to inspect all the vehicles required to be inspected. While these contentions are generally without merit, we do not address them since we have already determined that the statute is unconstitutional.

IN THE

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

CIVIL ACTION No. 80-899

AMERICAN TRUCKING ASSOCIATIONS, INC., PENNSYLVANIA MOTOR TRUCK ASSOCIATION, MARYLAND MOTOR TRUCK ASSOCIATION, COASTAL TANK LINES, INC., CRST, INC., SMITH TRANSFER CORP., RYDER TRUCK LINES, INC., and PRESTON TRUCKING CORP.,
Plaintiffs

v.

THOMAS D. LARSON, Secretary of the Department of Transportation of the Commonwealth of Pennsylvania, et al,
Defendants

STEAMSHIP OPERATORS INTERMODAL COMMITTEE,
Plaintiff-Intervenor

ORDER

AND Now, this 10th day of June, 1981, in accordance with the accompanying opinion, IT IS HEREBY ORDERED that a declaratory judgment be entered in favor of the Plaintiffs and Plaintiff-Intervenor declaring 75 Pa. C.S.A. § 4703(a)(2) unconstitutional as an impermissible burden on interstate commerce. IT IS FURTHER ORDERED that the

Defendants and any other official or employee of the Commonwealth of Pennsylvania under Defendants' control, direction or authority be and they hereby are enjoined from enforcing 75 Pa. C.S.A. § 4703(a)(2).

/s/ R. DIXON HERMAN
R. Dixon Herman
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 81-2312

AMERICAN TRUCKING ASSOCIATIONS, INC.; PENNSYLVANIA MOTOR TRUCK ASSOCIATION; MARYLAND MOTOR TRUCK ASSOCIATION; COASTAL LINES, INC.; CRST, INC.; SMITH TRANSFER CORP.; RYDER TRUCK LINES, INC.; PRESTON TRUCKING CORP.

v.

LARSON, Thomas D.; Secretary of the Dept. of Transportation of the Co. of Pa.; BARTLE III, Harvey, Atty. Gen. Co. of Pa.; DUNN, Daniel F., Commissioner of the Pa. State Police,

Appellants

(D.C. Civil No. 80-0899)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Present: ADAMS and SLOVITER, *Circuit Judges;* and VAN ARTSDALEN, *District Judge.**

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Middle District of

* Honorable Donald W. VanArtsdalen, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

Pennsylvania and was argued by counsel on February 16, 1982.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, entered June 10, 1981, be, and the same is hereby reversed. Costs taxed against appellees.

ATTEST:

/s/ SALLY MAVOS
Clerk

July 20, 1982

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 81-2312

AMERICAN TRUCKING ASSOCIATES, INC. et al.,
Appellees

v.

THOMAS D. LARSON, Secretary of the Department of Transportation, et al.,
Appellants

SUR PETITION FOR REHEARING

Present: SEITZ, *Chief Judge*, ALDISERT, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER, BECKER, *Circuit Judges*, and VAN ARTSDALEN, *District Judge* *

The petitions for rehearing filed by American Trucking Associations, Inc., et al., Appellees, and Steamship Operators Intermodal Committee, Appellee-Intervenor, in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the

* Honorable Donald W. VanArtsdalen, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petitions for rehearing are denied.

Judges Adams and Hunter would grant the petition for rehearing.

By the Court,

/s/ DOLORES K. SLOVITER
Dolores K. Sloviter
Circuit Judge

Dated: Aug. 13, 1982

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 81-2312

AMERICAN TRUCKING ASSOCIATIONS, INC.
PENNSYLVANIA MOTOR TRUCK ASSOCIATION
MARYLAND MOTOR TRUCK ASSOCIATION
COASTAL LINES, INC.
CRST, INC.
SMITH TRANSFER CORP.
RYDER TRUCK LINES, INC.
PRESTON TRUCKING CORP.

v.

LARSON, Thomas D.
Secretary of the Dept. of
Transportation of the Co. of Pa.;
BARTLE, III, Harvey, Atty. Gen.
Co. of Pa.
DUNN, Daniel F., Commissioner
of the Pa. State Police,

Appellants

(D.C. Civil No. 80-0899)

Pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure, it is ORDERED that issuance of the certified judgment in lieu of formal mandate in the above

cause be, and it is hereby stayed until September 20, 1982.

/s/ DOLORES K. SLOVITER
Dolores K. Sloviter
Judge

Dated: Aug. 20, 1982

STATUTE INVOLVED

75 Pa. Cons. Stat. Ann. § 4703(a)(2)

(Purdon Cum. Supp. 1982-1983)

§ 4703. Operation of vehicle without official certificate of inspection

(a) General rule.—

(1) Except as otherwise provided in this section, no motor vehicle required to bear current registration plates issued by this Commonwealth shall be driven and no trailer required to bear current registration plates issued by this Commonwealth shall be moved on a highway and no mass transit vehicle shall be operated unless the vehicle displays a currently valid certificate of inspection issued under this chapter.

(2) No motor carrier vehicle shall be operated on a highway unless it displays a currently valid certificate of inspection issued under this chapter or by another state.

Office - Supreme Court, U.S.
FILED
NOV 8 1982
ALEXANDER L. STEVAS,
CLERK

NO. 82-468
NO. 82-505

IN THE

UNITED STATES SUPREME COURT

October Term, 1982

AMERICAN TRUCKING ASSOCIATIONS, INC.,
AND
STEAMSHIP OPERATORS INTERMODAL COMMITTEE, et al.,
Petitioners

v.

THOMAS D. LARSON, et al.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THOMAS D. LARSON, et al., IN OPPOSITION

Michael R. Deckman*
Robert C. Bell
Scott M. Olin

Ward T. Williams
Chief Counsel
Office of Chief Counsel
Pennsylvania Department of Transportation
Harrisburg, Pennsylvania 17120
(717) 787-8846

Jay C. Waldman
General Counsel
Office of General Counsel
Commonwealth of Pennsylvania
Counsel for Respondents

November 5, 1982

*Counsel of Record

TABLE OF CONTENTS

Page

STATEMENT 1

ARGUMENT: Reasons for Denying the Writ 3

A. Section 4703(a)(2) is Permissible Highway Safety Legislation Under Standards for Dormant Commerce Clause Analysis 3

B. This Case Is Not The Issue of Bibb, Raymond, and Kassel 6

C. Summary 8

CONCLUSION 10

TABLE OF AUTHORITIES

Page

Cases:

Bibb v. Navajo Freight Lines, Incorporated
359 U.S. 520 (1959) 3, 5, 6, 7

Hunt v. Washington Apple Advertising Commission,
432 U.S. 333 (1977) 7

Kassel v. Consolidated Freightways Corporation,
450 U.S. 662 (1981) 5, 7

Raymond Motor Transportation, Incorporated v. Rice,
434 U.S. 429 (1978) 3, 5, 6, 7

South Carolina State Highways Department v. Barnwell,
303 U.S. 177 (1938) 6

Statutes and Regulations:

75 Pennsylvania Consolidated Statutes §4703(a)(2) .... *passim*

75 Pennsylvania Consolidated Statutes §102 1

23 CFR 1204.4 (1981) 8

49 CFR 392.7 (1981) 8

STATEMENT

On June 10, 1981, the Honorable R. Dixon Herman of the District Court for the Middle District of Pennsylvania, in an action brought by Petitioner American Trucking Associations, Inc. ("Petitioner ATA") and Petitioner Steamship Operators Intermodal Committee ("Petitioner SOIC"), declared 75 Pennsylvania Consolidated Statutes Section 4703(a)(2) ("Section 4703(a)(2)") unconstitutional and permanently enjoined its enforcement. Section 4703(a)(2) provides in part:

> (2) No motor carrier vehicle shall be operated on a highway unless it displays a currently valid certificate of inspection issued under this chapter or by another state.

Section 102 of Title 75 (75 Pa. C.S. 102) defines "motor vehicle carrier" as:

> A truck, truck trailer or combination having a gross weight or registered gross weight in excess of 17,000 pounds.

Thomas D. Larson, Secretary, Pennsylvania Department of Transportation, *et al.* ("Respondents"), appealed to the Court of Appeals for the Third Circuit, which on July 20, 1982, reversed the decision of the District Court. In an opinion authored by the Honorable Dolores K. Sloviter, the Court of Appeals stated that the lower court did not apply a proper standard of review but based its decision on "whether the evidence presented by the Commonwealth *convinced it* that inspections were desirable." (Emphasis added) ATA-SOIC A. 26.[1]

The District Court erred by imposing upon Respondents the burden of proving that all uninspected motor carrier vehicles are unsafe vehicles. ATA-SOIC A. 27. This burden was far in

1. Citations ("ATA-SOIC A.") are to Appendix for Petitioners, American Trucking Associations, Incorporated, *et al*, and Steamship Operators Intermodal Committee, To Petition For a Writ of Certiorari to the United States Court of Appeals for the Third Circuit".

Citations ("A") are to pages in the Joint Appendix in the Court of Appeals.

excess of the degree of proof required under the appropriate commerce clause analysis standard and greatly exceeded Respondents' proposition that some, but not all, uninspected vehicles have mechanical defects which contribute to accidents and which defects are discoverable and correctable by periodic inspections.

The District Court misunderstood and misapplied Respondents' evidence. The District Court erroneously assumed that if between 40% and 60% of selectively and randomly inspected motor carrier vehicles have vehicle defects of a caliber necessitating their being placed out of service by the Bureau of Motor Carrier Safety while only 8.8% of all motor carrier vehicles involved in accidents had mechanical defects as accident causal factors, then no relationship exists between the occurrences of these accidents and the occurrences of mechanical defects. The Court of Appeals rejected this assumption. ATA-SOIC A. 22. Rather, the 8.8% figure (a figure understated by perhaps a factor of 3) and "other exhibits introduced by the truckers themselves" showed the correlation between accidents and mechanical defects. ATA-SOIC A. 26-27. Furthermore, Respondents' showed that the inspection program will correct and prevent mechanical defects by detecting the effects of mechanical deterioration and failure before a final stage of failure occurs. ATA-SOIC A. 24-25.

In light of these showings, the Court of Appeals could not but conclude that in the absence of discrimination–which was lacking here–and in the presence of an impact on commerce stemming merely from an inspection requirement, Section 4703(a)(2) contributed to highway safety and the Pennsylvania Legislature had a reasonable basis to so believe. ATA-SOIC A. 27-28.

On August 3, 1982, Petitioners filed Petitions for Rehearing which where denied on August 13, 1982, by the Court of Appeals en banc.

REASONS FOR DENYING THE WRIT

Section 4703(a)(2) is a valid highway safety measure consistent with this Court's judgments on free and fair trade. This statute imposes an inspection requirement on all motor carrier vehicles (*i.e.* large trucks and combinations weighing in excess of 17,000 lbs.) which traverse Pennsylvania highways. The statute is non-discriminatory in intent and application, and is consistent with federal regulations encouraging states to promote highway safety through periodic vehicle inspection programs. The record establishes, as the opinion of the Court of Appeals denotes, that Section 4703(a)(2) fosters readily observable highway safety benefits.

Petitioners err by their suggestion that this case offers an "unrestricted opportunity" for this Court to clarify the standard for dormant commerce clause analysis. The record afforded here would enable Section 4703(a)(2) to pass constitutional muster as permissible highway safety legislation under those standards of review appearing in this Court's recent opinions. Furthermore, this case falls beyond those three (3) isolated instances relied upon by Petitioners where this Court invalidated highway safety regulations.

A. Section 4703(a)(2) is Permissible Highway Safety Legislation Under Standards for Dormant Commerce Clause Analysis.

This Court has traditionally viewed highway safety legislation with deference. Unlike persons, state legislation is not created equally and highway safety legislation, enacted pursuant to a state's police powers, is accorded a higher degree of judicial deference than other enactments. *Bibb v. Navajo Freight Lines, Incorporated*, 359 U.S. 520, 522-23 (1959). This safety legislation carries a "strong presumption of validity" when challenged in court and challengers face a severe task to overcome it. *Raymond Motor Transportation, Incorporated v. Rice*, 434 U.S. 429, 444 (1978). Highway safety legislation is within the category of legislation least amenable to attack on constitutional grounds.

In recent years, this Court has reviewed the extent of permissible state regulation of interstate commerce under the dormant commerce clause. Respondents admit that some

ambivalence exists in this Court's treatment of the issue and that differing standards have emerged, *e.g.* "the non-illusory safety interest" test which is satisfied by a showing of a colorable impact on safety, and the "local interest balanced against impediment to commerce" test which combines traditional language of deference with an examination of the benefits and burdens of the state regulation.

Respondents believe that the former test is the proper standard, but suggest that Section 4703(a)(2)– legislation non-discriminatory in intent and application–poses sufficient safety benefits to pass either standard. While the Court of Appeals acknowledged that its judgment in upholding Section 4703(a)(2)'s constitutionality was fashioned under the "non-illusory safety interest" test, Section 4703(a)(2) would have survived had its safety benefits been weighed against its impact on commerce.

Respondents produced sufficient evidence to support their claim that the Pennsylvania Legislature had a reasonable basis to believe that periodic inspection of motor vehicles benefit highway safety. A discernable relationship exists between mechanical defects in motor carrier vehicles, which mechanical defects are discoverable and correctable by periodic inspections, and the occurrence of accidents.

> Pennsylvania introduced a broad array of evidence designed to show that the statute was indeed a valid safety measure. The Commonwealth introduced evidence that: national and local accident statistics show a significant increase in the number of accidents involving motor carrier vehicles; in inspections of interstate motor carrier vehicles on Pennsylvania highways conducted by the BMCS with the assistance of the Pennsylvania State Police, a significant percentage of the vehicles were found to have defects which warranted their being placed out of service; in comparison to all motor vehicles, motor carrier vehicles (large trucks etc.) are involved in a disproportionately large number of accidents in Pennsylvania for which vehicle failure is a factor contributing to the accident. In Pennsylvania factors such as geography, climate, roadway design and topography interrelate to create special safety problems for truck travel upon Pennsylvania roads. Penn-

> sylvania's inspection program is designed to and will correct and prevent mechanical failure and deterioration. And, there is a relationship between low incidence of mechanical defects and periodic inspection. Citations omitted. Court of Appeals Opinion at ATA-SOIC A. 20-21.

Furthermore, Respondents showed:

> (1) that mechanical failures generally are slow and progressive in nature and that very few of the failures are instantaneous, and (2) that although the precise point of mechanical failure is not predictable, "the effects of this deterioration and failure [can] be detected by an inspection", and (3) that the Commonwealth's program will detect, correct and prevent failure and deterioration "before they reach the final stage of failure." Citations omitted. Id. at ATA-SOIC A. 24-25.

The record, replete with evidence on Section 4703(a)(2)'s safety benefits, sets this case off distinctly from *Bibb* and *Raymond, supra*, and *Kassel v. Consolidated Freightways Corportation* 450 U.S. 662 (1981), where the various states failed to make even a "colorable showing" that their legislation contributed to safety.[2] Unlike the plaintiffs in the aforementioned instances, Petitioners failed to offer any credible evidence that non-inspected motor carrier vehicles were as safe as or safer than or had fewer mechanical defects than had inspected vehicles.

Petitioner ATA seeks to mislead this Court by its allegations on the safety issue. Petitioner ATA suggests that Section 4703(a)(2) will worsen the risk of accidents as motor carrier vehicles leave the interstate system in search of inspection stations. This suggestion emphasizes Petitioners' misunderstanding of Section 4703(a)(2)'s incidental, through permis-

2. Petitioner ATA's second argument–a suggestion that the Court of Appeals enunciated a new commerce analysis standard marked by an irrebutable presumption in support of a state's safety justification for a statute–is at odds with the analysis followed by the court and its reliance upon the many showings of Section 4703(a)(2)'s safety benefits in the record.

sible, impact on commerce. Petitioner ATA ignores the showings that inspections are at the most a twice a year occurrence; that Respondents will accept inspections performed by sister states; that a network of approximately 1000 inspection stations capable of inspecting motor carrier vehicles existed throughout Pennsylvania in close proximity to major highways in 1980 at the time of the District Court hearing, and this number would surely increase as need dictated; and that any additional mileage which may be incurred by uninspected vehicles on Pennsylvania highways as they sought inspection facilities would be de minimus in comparison to the mileage traversed by these vehicles if uninspected.

Petitioner ATA suggests that Section 4703(a)(2) was conceived by the Pennsylvania Legislature without any regard for safety because Petitioner ATA was not able to discover legislative debate on the issue. But, as this Court has noted, legislative silence is not to be equated with legislative ignorance or disregard. *South Carolina State Highway Department v. Barnwell*, 303 U.S. 177, 191 (1938).

Petitioner ATA suggests that two of Respondents' surveys (designed to compare the frequency of mechanical defects in vehicles from non-inspection and inspections states) were contrived subsequent to the filing of Petitioners' complaints. Petitioner ATA omits to add that the Survey of Equipment Violations of Vehicles Carrying Hazardous Substances (A. 1175) was culled from data in Respondents' files collected prior to the filing of this action, and these data show that uninspected motor carrier vehicles transporting hazardous substances on Pennsylvania highways evidenced higher rates of out-of-service violations, major violations and total violations (14%, 29% and 7% respectively) than did inspected vehicles transporting similar cargo. A. 990-91, 1267.

B. This Case Is Not The Issue of *Bibb*, *Raymond*, and *Kassel*.

In its last thirty terms, this Court has struck down highway safety legislation in only three instances: *Bibb*, *Raymond*, and *Kassel*, *supra*. Factors which compelled this Court to act were showings that state legislation irreconcilably conflicted with that of sister states (*Bibb*, *supra*), states aggressively pursued parochial interests at the expense of national commerce (*Kassel*,

supra), a maze of statutory exemptions negated the alleged safety rationale underlying the statutes *(Raymond, supra)*, and enforcement would bar whole categories of vehicles and commerce from a state's territory *(Bibb, Raymond, Kassel, supra)*. None of these concerns are present in this case. Moreover, the record establishes that Section 4703(a)(2) is consistent with principles of free and fair trade, federal inspection regulations and highway safety enhancement.

Section 4703(a)(2) applies equally to all motor carrier vehicles traversing Pennsylvania highways regardless of state of registration. Unlike the Illinois regulations in *Bibb*, Section 4703(a)(2) does not conflict with the laws of any other state. Indeed, 26 states and the District of Columbia enforce vehicle inspection programs. Unlike the Wisconsin and Iowa regulations in *Raymond* and *Kassel* respectively, Section 4703(a) is free from that "maze of exemptions" which benefit local interests. *All* Pennsylvania regulated motor carrier vehicles are subject to inspection. Section 4703(a)(2) neither bars uninspected vehicles from Pennsylvania highways nor forces truckers to modify the structure and mechanical components of their vehicles upon entry to the state. Section 4703(a)(2) imposes an inspection requirement only. Indeed, truckers can comply with this requirement via inspections in those other states and the District of Columbia with inspection programs or by inspection in Pennsylvania.

Section 4703(a)(2) does not discriminate in favor of local industry. Far from imposing a burden upon out-of-state vehicles not imposed on Pennsylvania registered vehicles, Section 4703 (a)(2) merely equalizes the burden on both classes of vehicles. Petitioner ATA's reliance on *Hunt v. Washington Apple Advertising Commission*, 432 U.S. 333 (1977) illustrates, as the Court of Appeals noted, Petitioner's misapprehension of the discrimination issue. Court of Appeal's Opinion, f.n. 10 at ATA-SOIC A. 25.

It is erroneous to assume that Section 4703(a)(2) merely requires inspections additional to those required under the inspection program of the federal Bureau of Motor Carrier Safety ("BMCS"). The BMCS Program is underfunded, undermanned, readily ignored, and, when enforced, reaches only those vehicles which fall within a narrowly drawn definition of interstate commerce. BMCS inspection guidelines are so vague

as to be meaningless.[3]

Truck drivers–it is the drivers who are expected to enforce these guidelines–lack mechanical expertise, inspection equipment and facilities to correct defects, but have no lack of employer pressures to ignore the guidelines and get rolling. It is not surprising that pursuant to selective and random BMCS roadside inspections, between 40% and 60% of these truck driver inspected vehicles are found to be "hazardous and placed out of service." ATA-SOIC A. 22.

The failures of the BMCS Program have not gone unnoticed. United States Congressman Walgren testified that ". . . the federal government is just not in a position – nor has it been in a position – to effectively deter violations of these [BMCS] standards or keep the system together" (A. 930).

Far from being a mere incident to the BMCS program, Section 4703(a)(2) stands as the only effective means by which Respondents can protect highway users from motor carrier vehicles with mechanical defects. Section 4703(a)(2) actually enforces the federal quest for a national commerce policy that "[e]ach state shall have a periodic inspection of all registered vehicles. . .". 23 CFR 1204.4, Highway Safety Program Standard No. 1 (1981).[4]

C. Summary

Respondents suggest that this case is not the vehicle through which this Court may clarify the standard for review in

3. Compare, for example, the BMCS guidelines codified at 49 CFR 392.7 with the scope and detail of Respondents' inspection requirements as described at A. 634-42.

4. Petitioner SOIC suggests that the Court of Appeals erred on two other accounts– *i.e.*, the Court exceeded its powers by substituting its own findings of fact without *stating* that those of the District Court were clearly erroneous, and by depriving the Petitioner of his property right of operating commercial vehicles on a state highway without due process of law. On the first point, a reading of the Court of Appeals's opinion is sufficient to show that the District Court's findings were found to be clearly erroneous, unsupported by and against the weight of the evidence. On the second point, the use of state highways by Petitioner's commercial vehicles is not a property right and Petitioner's citations (SOIC's Brief at P. 12) do not support the contention that it is.

dormant commerce clause cases. The record is replete with sufficient evidence to show Section 4703(a)(2) does contribute to highway safety and would pass any of this Court's commerce analysis standards. Section 4703(a)(2) is non-discriminatory in intent and application, provides significant safety benefits far exceeding any de minimus impact on commerce, and furthers the federal quest for a national commerce policy that the states have periodic inspection programs.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

Michael R. Deckman
Counsel of Record

Robert C. Bell
Scott M. Olin

Ward T. Williams
Chief Counsel
Office of Chief Counsel
Pennsylvania Department of
Transportation
Harrisburg, Pennsylvania 17120
(717) 787-8846

Jay C. Waldman
General Counsel
Office of General Counsel
Commonwealth of Pennsylvania
Counsel for Respondents

November 5, 1982